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IN THE

Supreme Court of the United States

October Term 1967
No. 1052

ROBERT E. BOEHME,
Petitioner,
v.
STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

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ROBERT E. BOEHME,
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STATE OF WASHINGTON,
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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Washington

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Robert E. Boehme, M.D., a citizen of the United States of America and the State of Washington, prays that this court issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Washington affirming the judgment of the Superior Court of the State of Washington for Pierce County determining that the petitioner is guilty of the crime of First Degree Assault and sentencing him to confinement in the State Penal Institution for a period of not more than 20 years.

OPINIONS BELOW

The judgment and sentence of the Superior Court of Washington for Pierce County was entered upon

the verdict of the jury without opinion after the motion for new trial was denied. (Appendix A)

The opinion of the Supreme Court of the State of Washington affirming the decision of the trial court is printed in Appendix B, and is reported in 71 Wash. Dec. 2d 609, (1967). The decision of the Supreme Court of the State of Washington was rendered on July 18, 1967 and the Petition for Rehearing was denied and the judgment became final on the 8th day of December, 1967.

A stay of judgment was denied by the Washington Supreme Court and was also denied by the United States Supreme Court on December 14, 1967 and petitioner is now in prison in Washington State.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3):

> ". . . Where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . . "

because the petitioner is claiming title, rights, privileges and immunities under the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

The rules of this Court under which the Petition lies are Rule 19, providing for Certiorari to the State Courts; Rule 22, allowing a petition to review a judgment of a state court to be filed within 90 days after the final entry of such judgment; and Rule 23 prescribing the form and the contents of the petition.

QUESTIONS PRESENTED

1. Did the action of the trial court in requiring and admitting the testimony of the wife's physicians as to confidential disclosures made in the course of treatment by the petitioner's wife deprive the petitioner and his wife of their constitutional rights of privacy in marriage and their property rights therein in violation of the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States?

2. Did the action of the trial court in admitting hearsay testimony as to the results of certain chemical tests for cholinesterase which were not performed by, nor seen by, nor described by, the witness who testified from memory concerning the results (the person who performed the tests never being present in court at any time) deny the defendant his right to confront the witnesses against him as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

3. Did the action of the trial court in permitting the oral amendment of the Information by the prosecution during the trial so as to change the entire theory of how the poison was administered deprive the defendant of his constitutional right to be timely and adequately informed as to the nature of the charges against him as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the Unit d States?

4. Did the extensive pre-trial publicity, the action of the trial court in setting aside a portion of the courtroom for the press, the extensive television, ra-

dio, magazine and newspaper coverage, the free passage of the press to and from the courtroom during the trial, the hostile, partisan mob in the hall through which the jurors had to pass each of the many days of the trial, deprive the petitioner of a fair trial under the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States in violation of the holding in *Sheppard v. Maxwell,* 384 U.S. 333, 16 L.Ed 2d 600, 86 S.Ct. 1507 (1966)?

5. Did the action of the State of Washington in holding a felony charge over the head of Wanda Ostby, one of the key witnesses for the prosecution (the other woman necessary for the alleged motive) during the trial of the petitioner and then dismissing the charge immediately after his conviction by the jury, and the action of the prosecutor, John McCutcheon, during the trial when he, the prosecutor, represented to the trial court that there were no criminal charges pending against the said Wanda Ostby, together operate to deprive the petitioner of his right to a fair trial under the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions under which the petitioner claims title, rights, privileges and immunities are: The Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution. They are printed in full in Appendix D.

The Statute of the State of Washington defining the

crime of First Degree Assault is R.C.W. 9.11.010, and is printed in full in Appendix E.

STATEMENT

I. Pleadings and Prior Proceedings

The petitioner, Robert E. Boehme, was charged by an amended written Information in the Superior Court of the State of Washington for Pierce County with the crime of Assault in the First Degree (R.C.W. 9.11.010) allegedly committed by the injection into his wife's (Mary Boehme) buttocks of an anticholinesterase agent and/or promozine (sparine) with the intent to kill. A plea of Not Guilty was entered and the case tried before a jury.

On the jury's verdict of guilty, your petitioner was sentenced to not more than 20 years confinement in a Washington Penal Institution. The motion for new trial was denied and appeal was taken to the Washington State Supreme Court, which affirmed the decision of the trial court and denied a petition for rehearing on December 8, 1967. A stay of judgment was denied by the Washington State Supreme Court and by the United States Supreme Court and petitioner is now confined in a Washington prison.

II. Essential Facts

From the evidence presented it appeared that Mary Boehme, the wife of the petitioner, was injured by a falling plank, was taken to a hospital in Tacoma, Washington, and was treated for a brain injury. Thereafter, while she was in the hospital, the petitioner gave her an injection in the buttocks.

Petitioner asserted that this injection was ritalin, a harmless, mild stimulant, administered in the belief that his wife's continued unconsciousness was the result of a self-administered dose of sparine. The prosecution contended that the injection was an anticholinesterase drug and was done with the intent to kill, and that petitioner's motive was an affair with another woman, Wanda Ostby.

Cholinesterase has been defined as a class of enzymes found in the blood and tissue of the human body which have the ability to act upon acetylcholine and divide it into acetic acid and choline thereby destroying its ability to conduct electrical impulses. Acetylcholine is present in the body and is important because it stimulates the nerve impulses in the parasympathetic nervous system. When the cholinesterase level is low, acetylcholine accumulates resulting in the continuous stimulation of the parasympathetic nervous system which produces undesirable symptoms, such as sweating, salivation, dim vision, myosis of the pupil of the eye, fibrolation or twitching of the muscles, nausea, vomiting, diarrhea, respiratory failure, cyanosis, etc.

There are at least two distinct forms of the enzyme; acetylcholinesterase, sometimes known as "true" cholinesterase, which is found in the nerve tissues and the red blood cells, and pseudo-cholinesterase, which is found in the blood plasma and various other tissues of the body. Neither enzyme has ever been actually seen or fully understood, but its presence or absence is believed to be significant for diagnostic purposes

and blood is commonly used to test for it, usually by dividing the blood into red cells and plasma and testing each separately. Its presence or absence is determined by whether or not acetic acid is liberated from a standard solution of acetylcholine. The activity of the enzyme is determined by how much acetic acid the cholinesterase will liberate in a measured period of time from a solution of known acetylcholine concentration. There are many methods for doing this: manometric, titrimetric, electro-metric and colorimetric and many variations and combinations of each of the general methods. Any test by any method depends upon the exact measurement of exceedingly small amounts of chemicals and of specimens, exact control of temperature, and exact measurement of time, and the possibility of error is therefore very large.

The function of cholinesterase in the body can be interfered with by various chemicals. Organic phosphorus compounds are irreversible inhibitors in that they permanently destroy the enzyme. Carbamates are reversible inhibitors in that they do not destroy the enzyme but merely interfere on a temporary basis with its function. Proceeding on the theory that Mary Boehme had been poisoned with an anti-cholinesterase agent, the prosecution began its case with a reference to organic phosphorus poisons (used for garden sprays) and then presented the evidence of Dr. Petty of Baltimore, Maryland, concerning tests made for cholinesterase levels in blood samples taken from Mary Boehme without her consent by her attending physicians. Dr. Petty testified that he had not per-

formed the tests himself but that a technician who he first identified as Dr. Richard Johns (St. 524) and later identified as Orindorff (St. 525) told him, Dr. Petty, the results of the tests. Dr. Petty then proceeded over proper objection on hearsay and constitutional grounds to testify from memory *as to what the technician had told him* as to the results of the tests and placed the results on a blackboard scratch pad (Ex. 34) as follows:

CHOLINESTERASE LEVEL IN MARY BOEHME'S BLOOD

	TIME	RED BLOOD	PLASMA
1.	10:40 P.M. 6-30-65	7.1	:0011
2.	2:00 A.M. 7- 1-65	7.05	1.1
3.	7- 9-65	4.65	2.2
4.	7-15-65	4.75	2.8
5.	7-15-65	4.61	2.1
6.	Control	4.65	1.8

(R. St. 520-520-A; St. 533; Ex. 34)

thereby offering the out of court statement of the technician as proof of the matter asserted. From the fact that the plasma reading at 10:40 in the evening (approximately two hours after the alleged assault) was .0011, and was near normal at 2 A.M., the next morning, and that the red blood readings were not below normal, *Dr. Petty concluded and testified that Mary Boehme had been poisoned with a carbamate poison* (St. 548). Dr. Petty also testified that sparine would have no effect on cholinesterase levels in the body (St. 548).

Tests for carbamate poisons may also be made

from the urine. In this case urine specimens were taken (Ex. 22, 23) and were personally tested by Dr. *Freimuth, a chemist and toxicologist, witness for the prosecution, who, on the basis of his tests, ruled out any carbamate poison* (St. 498, 499).

Nonetheless, the case was submitted to the jury on the basis of Dr. Petty's testimony that Mary Boehme had been poisoned with a carbamate poison. The man who allegedly performed the tests was never in court, never testified, and no explanation was ever offered by the prosecution as to why he could not be in court. No hint as to his identity was given to defense counsel at any time prior to the admission of the hearsay testimony of Dr. Petty, which was the only evidence that would support the state's theory of poisoning by an anti-cholinesterase agent.

During the course of the trial the testimony of the attending physicians, the hospital personnel and the nurses who treated Mary Boehme to establish physical symptoms and the identity of the specimens taken and their observations of her as a patient were admitted over her objection and over the objection of her husband, the petitioner, all of which testimony was prejudicial to the defendant.

Late in the trial, the prosecution was permitted over the petitioner's objection to orally amend the Information to permit the introduction of evidence of sparine found in an intravenous bottle which was taken from Mary Boehme's room (its custody for two weeks was unaccounted for) and to offer over objection subsequent testimony of Dr. Petty (St. 558)

that Mary Boehme had been poisoned with sparine. (This is in contradiction to his earlier testimony that she had been poisoned with a carbamate poison).

Petitioner objected to its admission and to the instructions given to the jury upon the new theory and at no time waived his constitutional rights.

The testimony of Wanda Ostby, the other woman in the case, was the principal evidence of motive. She testified as to an affair with defendant and as to incriminating statements he allegedly made. On cross examination she denied that there were any criminal charges pending against her or that any inducement had been made to her to secure her testimony. The prosecuting attorney sprang to her defense and assured the court that there were no criminal charges of any kind against her and further cross examination was thereby foreclosed. After the verdict of the jury, petitioner's counsel discovered that the representations of the prosecuting attorney were false and that a charge of grand larceny had been pending against Wanda Ostby in Kitsap County during the petitioner's trial and that it had been dismissed immediately after the jury's verdict was in. Nonetheless, the motion for new trial on this and other grounds was denied.

The trial was preceded by extensive publicity about the petitioner's prior trial and acquittal for a similar offense allegedly committed by him against his first wife, and extensive radio, television, newspaper and magazine coverage of every aspect of the case before and during the trial made the matter everyday con-

versation for everyone, so that it was impossible to secure a jury who had not heard or read about the matter. During the trial the judge set aside a portion of the courtroom for the press, and they were allowed to move freely in and out, although the spectators had to stand in line for hours for access to the courtroom. That throughout the trial the jury had to pass to and from the courtroom through a large and hostile crowd in the hallway and were subject to picture taking of both T.V. and newspaper photographers.

III. The Stages at Which Federal Questions Sought to Be Reviewed Were Raised

1. As to the constitutional right to privacy between husband and wife and physician, it was raised at the trial level by a demurrer to the Information, by repeated objection to the admission of the evidence of the physicians and at the motion for new trial. Upon appeal it was presented in the assignments of error in the brief and was denied on constitutional grounds in the opinion of the Washington State Supreme Court. (App. B).

2. As to the constitutional right to confront and cross-examine the witness who performed the blood tests, it was raised at the trial level by repeated objections to the admission of the testimony of Dr. Petty and again on the motion for new trial. Upon appeal it was presented in the assignments of error, in the brief and it was denied on constitutional grounds in the opinion of the Washington State Supreme Court. (App. B)

3. As to the constitutional right to seasonably know whereof the defendant is charged, it was raised during the trial by the objection to the admission of evidence of the contents of the intraveneous bottle and to the tests made thereon (R. St. 1157); by objection to the oral amendment to the information; and by objections to the instructions given by the trial court to the jury. It was raised again on the motion for new trial. Upon appeal it was presented in the assignments of error in the brief and it was denied upon constitutional grounds in the opinion of the Supreme Court of Washington (App. B).

4. As to the constitutional right of a fair trial as guaranteed under the doctrine of *Sheppard v. Maxwell, supra,* this issue was raised in the trial court by the motion for new trial and in the alternative for a writ of *coram nobis* (The *Sheppard* case not having been decided at the time of trial). Upon appeal it was presented in the assignments of error in the brief, and the issue was decided by the Washington State Supreme Court on constitutional grounds against the petitioner.

5. As to the constitutional right of a fair trial being denied by the misrepresentation of the prosecuting attorney that no criminal charges were pending against Wanda Ostby, when in fact a felony charge was being held over her head during the trial, this issue was raised as soon as it was discovered, by the motion for new trial. Upon appeal it was presented in the assignments of error, in the brief and it was denied in the opinion of the Supreme Court of Washington on constitutional grounds.

REASONS FOR GRANTING THE WRIT

1. Throughout these proceedings beginning at the trial and to the present, Mary Boehme, the wife, the alleged victim, and the petitioner, the husband, the alleged assailant, have asserted his innocence, have lived together as husband and wife and have objected to the proceedings and to the disclosure of her confidential communications to her physicians. The action of the trial court in compelling the physicians to disclose the confidential communications and the proceeding itself invaded the privacy of the marriage-relationship guaranteed by the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965)

Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625 (1923)

2. Where chemical tests for cholinesterase levels in the blood are made their reliability depends upon certain things:

(1) An uncontaminated, unspoiled specimen, proper uncontaminated chemicals, and uncontaminated equipment.

(2) A proper method or procedure.

(3) Exact measurements of specimen and chemicals used.

(4) Exact measurement of time.

(5) Exact measurement and control of temperature.

(6) A proper measuring machine, in proper working order, standardized for the performance of the particular tests to be performed.

(7) A skilled and competent person to perform the tests.

(8) A proper record of the various steps of the test.

It follows that a careful scrutiny of the manner in which the tests are performed is absolutely necessary. Moreover, as is apparent from the results themselves, tests do not ordinarily read to four decimal places, but only to the nearest tenth of a unit insofar as the plasma is concerned. The inference of a misplaced decimal and hence a completely wrong diagnosis is almost inescapable as a reading of 1.1 is near normal. The right to cross-examination of the man who actually performed the test is not an idle technicality but the whole guts of the problem of finding the truth—and it was not found in this case. The error asserted was prejudicial in the highest degree. The hearsay testimony as to the results of the tests was absolutely essential to the prosecution's charge of poisoning by the administration of an anti-cholinesterase agent.

Dr. Petty's statement to the court that he had talked to a technician who was under his general supervision only (St. 526), who had told him that he had performed tests upon blood specimens for cholinesterase and reached certain results, was a hearsay statement. No opportunity was afforded the defendant to see the technician or to cross-examine him; no opportunity

was afforded to check whether Dr. Petty even remembered the results of the tests correctly; no opportunity was afforded to check the true identity of the technician, his skill, the manner in which the tests were performed, the kinds or measurements of chemicals used, the accuracy of his results; no opportunity was afforded to know for certain that the tests were even performed. (Dr. Petty stated he did not know the names of the individuals involved) (St. 524, 526).

The testimony of Dr. Petty as to the out-of-court statements of another individual were offered for the proof of the truth of the matters asserted. They denied to the petitioner the right to confront the witnesses against him guaranteed by the United States Constitution.

The right of a defendant to confront the witnesses against him grew up at Common Law and was thereafter recognized by the Sixth and Fourteenth Amendments to the United States Constitution. It is essentially the right to observe the witness and the right to cross-examine him. The right to cross-examine is the more important and has been described by Wigmore as the indispensable requirement of the constitutional right of confrontation. There are recognized exceptions to the hearsay rule but the error complained of in this case is not one of them. The Constitution of the United States does not permit the engrafting of such an exception to the constitutional rght.

Wilner v. Committee on Character & Fitness, 373 U.S. 96, 10 L.Ed. 2d 224, 83 S.Ct. 1175 (1963)

Green v. McElroy, 360 U.S. 474, 3 L.Ed. 2d 1377, 79 S.Ct. 1400

Wigmore on Evidence, 3rd Ed. 1940, Vol. V, p. 127, sec. 1397 (published by Little, Brown & Company)

The action of the trial court in receiving Dr. Petty's testimony as to the out-of-court statements of another as to the results of the chemical tests denied the petitioner his right to confront the witnesses against him and denied him a fair trial as guaranteed by the Fourteenth Amendment.

If the ruling in this case stands, no prosecutor will ever be required to produce the man who took the tests in a drunk-driving case, a fingerprint case, a handwriting case, a suspected-document case, a counterfeiting case or a ballistics case—a prosecutor will only be required to produce the head of the expert's department, who will testify as to the results of any tests as told to him. Cross-examination will be impossible. The right to cross-examine the state's witnesses, to confront them as guaranteed by the Constitution will be almost completely destroyed.

3. The Information as amended, upon which trial was begun, charged the petitioner with the crime of First Degree Assault in that it was alleged that petitioner injected into her buttocks an anti-cholinesterase agent and/or promazine (sparine) (Sup. St. 16, Reply Brief 6). In the early stages of the trial the testimony of Dr. Petty was that this substance was a carbamate poison (R. St. 548) which is an anticholinesterase agent. In the late stages of the trial,

over defense objection, the trial court allowed the prosecution to amend the Information to permit evidence that sparine was administered via an intraveneous bottle, and Dr. Petty then testified that Mary Boehme was poisoned with sparine (R. St. 558) which is not an anticholinesterase agent. The jury was instructed in accordance with the amended Information. Petitioner was not prepared for this change in the prosecution's attack because he did not have adequate notice nor time to prepare his defense.

Petitioner had the right under the Sixth and Fourteenth Amendments to the Constitution of the United States to be "informed of the nature and the cause of the accusation against him" and implicit in this right is that the notice be seasonable so that the defendant have adequate time to prepare his defense.

Wilner v. Committee on Character & Fitness, 373 U.S. 96, 10 L.Ed. 2d 224, 83 S.Ct. 1175

Cochrane v. United States of America, 157 U.S. 286, 39 L. Ed. 704, 705, 15 S.Ct. 628 (1895)

Hagner v. United States of America, 285 U.S. 427, 76 L.Ed. 861, 865, 52 S.Ct. 417 (1932)

Wharton's Criminal Law & Procedure by Ronald A. Anderson, Vol. IV, pages 556-559, Sec. 1762 (published by Lawyers Coop. Publishing Co. 1957)

4. The petitioner was entitled to a fair trial free from the influence of the hostile mob present in the hallways through which the jurors had to pass each day of the trial; free from the prejudicial pretrial publicity by radio, T.V. and newspapers; free from

the improper influence of the press during the trial which had set aside to it a specific portion of the courtroom from which reporters passed freely during the trial. *Sheppard v. Maxwell,* 384 U.S. 333, 16 L.Ed. 2d 600, 86 S.Ct. 1507 (1966).

5. When during the course of the trial counsel for the petitioner undertook to coss-examine Wanda Ostby, the other woman in the case, whose testimony as to an affair and incriminating statements had been offered by the prosecution to establish motive, as to whether or not she was charged with a crime and awaiting trial thereon, the prosecuting attorney then orally represented to the court that there were no outstanding criminal charges against her. After the verdict, petitioner discovered that in fact, the State of Washington had held a prosecution for Grand Larceny in Kitsap County over the head of Wanda Ostby throughout the trial and immediately dismissed the charge after the verdict against petitioner was rendered. The matter was then raised on the motion for new trial and denied. This conduct of the prosecuting attorney denied the defendant a fair trial as guaranteed by the Constitution.

It is the duty of the prosecutor to refrain from improper methods calculated to produce a wrongful conviction, and the suppression by the prosecution of evidence favorable to the accused, violates due process.

Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963)

Mooney v. Holohan, 294 U.S. 103,55 S.Ct. 340, 79 L.Ed. 791 (1935)

Berger v. U.S., 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935)

Porter v. U.S., 298 F. 2d 461, 464 (1962) 5th CCA

Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758 (1964)

cf. State v. Cerenzia, 134 Wash. 500, 503, 236 Pac. 80, 82 (1925)

Wigmore on Evidence, Vol. III, Sec. 967-8, p. 525, 3rd Ed. (1940) (Published by Little, Brown & Company)

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Frank August Peters

FRANK AUGUST PETERS,
Counsel for Petitioner

January 22,1968.

APPENDIX A

JUDGMENT OF TRIAL COURT

BE IT REMEMBERED, That at a session of the Superior Court of the State of Washington, in and for the County of Pierce, Department No. One, held at the Court House in the City of Tacoma, in said County and State, on the 15th day of March, 1966, present the Honorable Hardyn B. Soule, Presiding Judge of such Department, Jack Berry, Sheriff, and Don Perry, Clerk, the following proceedings (inter alia), were had and done, to-wit:

No. 35845

JUDGMENT AND SENTENCE

STATE OF WASHINGTON,
Plaintiff,
vs.
ROBERT E. BOEHME,
Defendant.

Now comes the Prosecuting Attorney for Pierce County, and the Defendant in this action with counsel, into Court, said Defendant, Robert E. Boehme, being brought to the bar of the Court here is duly informed by the Court of the nature of the information filed against him in this case, for the crime of Assault in the First Degree, committed on or about the 30th day of June, 1965; of his arraignment and plea of "Not Guilty" of the offense charged in the information; and of his trial, and the verdict of the jury rendered, presented and filed, on the 6th day of February, 1966; finding him "Guilty" as charged in the information. Whereupon said Defendant is now here asked by the court if he has any legal cause to show why judgment should not be pronounced against him, to which he says nothing, as he before said; and no sufficient cause being shown or appearing to the Court, the judgment of the Court is now here rendered: That whereas the said Defendant has been duly convicted in this Court of the crime of Assault

in the First Degree, it is hereby Ordered, Adjudged and Decreed that the said Defendant Robert E. Boehme, is guilty of the crime of Assault in the First Degree, and that he be punished therefor by confinement in a penal institution of the State of Washington, under the supervision of the Department of Institutions of the State of Washington, as shall be designated by the Director of Institutions, for a period of not more than Twenty years and said Defendant is now hereby committed to the custody of the Sheriff of Pierce County to be detained and by him delivered into the custody of the proper officers of the Washington Corrections Center for confinement, classification and placement in said institution. Defendant's exception to refusal to fix a sentence of 10 years is noted.

HARDYN B. SOULE, *Judge.*

WARRANT OF COMMITMENT

STATE OF WASHINGTON, } ss:
COUNTY OF PIERCE }

The State of Washington, To the Sheriff of Pierce County and to the Director of Institutions and the Superintendent of the Washington Corrections Center of the State of Washington, Greeting:

Whereas, Robert E. Boehme, has been duly convicted upon the 6th day of February, 1966, in the Superior Court of the State of Washington, for the County of Pierce of the crime of Assault in the First Degree and judgment has been pronounced against him and that he has been sentenced to a term of imprisonment in such Correctional Institution under the supervision of the Department of Institutions as shall be designated by the Director of Institutions pursuant to RCW 72.13.120 and a minimum term to be fixed by the Board of Prison Terms and Paroles. All of which appears to us of record; a certified copy of said judgment being endorsed hereon and made a part hereof.

Now, This Is to Command You, the said Sheriff, to detain the said Robert E. Boehme until called for by

the transportation officers of the Department of Institutions authorized to conduct him to the Washington Corrections Center, and this is to command you, the said Superintendent of the Washington Corrections Center to receive of and from the said officer or officers the said Robert E. Boehme, for confinement, classification and placement in such correctional facilities under the supervision of the Department of Institutions as shall be designated by the Director of Institutions for a maximum term of confinement of not more than Twenty (20) years and a minimum term to be fixed by the Board of Prison Terms and Paroles.

And these presents shall be authority for the same.

Herein Fail Not.

Witness, HON. HARDYN B. SOULE
Judge of the Said Superior Court and the seal thereof this 15 day of March, 1966.
DON PERRY, *County Clerk,*
By J. W. LODGE, *Deputy.*

[SEAL]

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 38826

En Banc

Filed July 18, 1967.

(Reported in 71 Wn. Dec. 2d 609)

THE STATE OF WASHINGTON,
Respondent,
v.
ROBERT E. BOEHME,
Appellant.

Defendant, Robert E. Boehme, a medical doctor, was charged, tried before a jury, and convicted of the crime of assault in the first degree. He appeals. We affirm the conviction.

The offense involved arose out of a purported attempt on the part of defendant to poison his wife, Mary Boehme. The circumstances giving rise to the charge, as revealed by the evidence, lend themselves to the following summary.

At about 9:30 p.m., on June 29, 1965, defendant, Mrs. Boehme, and two other members of the family went to the family boathouse to work on their boat. During the course of the evening, and while defendant and Mrs. Boehme were working at the bow of the boat, a board or heavy plank fell and struck Mrs. Boehme about the head. She was stunned or briefly rendered unconscious and fell to the floor. Upon regaining her senses, she complained of pain, and defendant administered to her by injecting a substance into her hip. Defendant then, with the aid of two members of the family, carried Mrs. Boehme to the family automobile and transported her to a local hospital, the Harrison Memorial Hospital in Bremerton, Washington, and summoned Dr. Benjamin T. Strehlow, a general practitioner, who had treated her

previously. After arrival at the hospital, and before Dr. Strehlow appeared, defendant removed Mrs. Boehme's contact lenses from her eyes. Defendant testified that during this procedure he inadvertently and unintentionally utilized a type of eye drops (isopto atropine) which would cause the pupils of her eyes to dilate.

When Dr. Strehlow reached the hospital he was informed by defendant that Mrs. Boehme had suffered a severe blow on the head, although the only surface manifestation thereof was a slight abrasion in the area of the neck. The doctor was not advised of any medication Mrs. Boehme might have taken during the day, nor of the earlier injection, and of the application of any eye drops. His examination of Mrs. Boehme revealed that the pupils of her eyes were widely dilated and that she was drifting in and out of a coma. The doctor thereupon ordered skull X rays and performed a spinal tap. The X rays were negative as to bone damage; however, the spinal tap indicated a bloody discoloration of and pressure on the spinal fluid. Dr. Strehlow then concluded that Mrs. Boehme was in urgent need of the services of a neurologist and with defendant's participation arrangements were made to transport her by ambulance to St. Joseph's Hospital in Tacoma, for the attention of Dr. Stanley Durkin, a neurologist and neurosurgeon.

The ambulance with Mrs. Boehme, the driver, one attendant, and the defendant reached St. Joseph's Hospital at about 1:30 a.m., June 30, 1965. The ambulance was met by Dr. Durkin. The defendant delivered samples of the spinal fluid removed by Dr. Strehlow and informed Dr. Durkin that Mrs. Boehme had been struck on the head. Again, the defendant neglected or forgot to advise the doctor of any earlier medications. Finding no superficial evidence of a blow to the head, except the neck contusion, Dr. Durkin ordered immediate skull X rays. Again the X rays were essentially negative as to skull damage; however, the doctor's physical examination, conducted while Mrs. Boehme was on the X ray table, revealed that she was

then in a deep semicomatose condition, that the pupils of both eyes were widely dilated and fixed, that her abdomen was hard and rigid, that her body muscles were spontaneously twitching and jumping, that deep tendon reflexes were absent, and that respiration was irregular. Proceeding upon a working diagnosis of brain injury, Dr. Durkin placed her in a hospital room under constant observation. Shortly after Mrs. Boehme arrived at her hospital room, and between 2:30 a.m. and 3:15 a.m., extreme respiratory difficulty developed. Artificial respiration, oxygen, and a Byrd respirator, an automatic breathing machine, were applied, the latter by the use of a face mask. Although these steps alleviated the immediate respiratory failure, her condition despite intermediate adjustments of the respirator did not measurably improve and by 8 a.m. her condition was diagnosed as terminal. At this point the Byrd respirator was turned on the fully controlled breathing cycle and connected to a tracheal tube leading directly into her windpipe. A second spinal tap was also made and again revealed discoloration of and pressure on the spinal fluid. The defendant was advised that her condition was very critical. Having patients of his own to care for, the defendant returned to his office.

During the course of the day, Mrs. Boehme rallied. Various of her symptoms diminished and her respiration improved to the point where she could breathe without the aid of the automatic respirator. She was placed upon an intravenous solution of glucose and water and, by early evening, her vital signs were such as to permit removal of the tracheal tube and coherent conversation. Dr. Durkin advised defendant he felt she was on the road to recovery.

At about 9 p.m., after Dr. Durkin had visited Mrs. Boehme and found her condition continuing to improve, the special nurse left her in the temporary charge of a student nurse. Shortly thereafter, defendant visited his wife and asked the attending nurse to leave the room. The student nurse complied, but returned to the room in a few minutes at which time

she observed defendant move his hand from the area of Mrs. Boehme's hip to his pocket. Again the defendant requested the nurse leave him alone with his wife, and again the nurse complied. On this occasion, however, the nurse reported the circumstances of her absence to the floor nurse who immediately entered Mrs. Boehme's room. At about this time, the defendant departed. The floor nurse, in company with the student nurse and the special nurse, then observed a fresh hypodermic injection site on Mrs. Boehme's hip. The nurses also noted that Mrs. Boehme was having difficulty in breathing. Dr. Howard Pratt, the anesthesiologist, who had previously removed the tracheal tube for the Byrd respirator, and an intern, a Dr. Kazi, were summoned and upon arrival found Mrs. Boehme in extreme straits. Her earlier symptoms had returned, her respiration was of the terminal type, and the doctors conceived that she was dying. Emergency measures were initiated, the trachea tube was reinstalled and the Byrd respirator reactivated. Dr. Durkin arrived and after consultation with Dr. Pratt and other doctors on the scene it was concluded that her condition was induced or caused by poisoning through the medium of some rare drug. This conclusion was reached upon the basis of the hypodermic injection sites on her hip and because some of her symptoms could not be reconciled with any but the gravest of brain injuries. Blood and urine samples were then taken, the intravenous bottle was detached, and all were sealed, marked for identification, and placed under refrigeration for subsequent analysis.

During the early morning hours of July 1, 1965, Mrs. Boehme again rallied dramatically. From that time forward she improved steadily and was ready for release from the hospital on July 15, 1965.

During the interval between July 1 and July 15, 1965, additional blood samples were taken, marked for identification, and refrigerated. These samples, together with the earlier blood samples were sequen-

tially prepared for analysis[1] and, with a similarly prepared sample of normal blood and the urine specimens, were forwarded to the office of the chief medical examiner of the state of Maryland for the attention of and analysis by Dr. Charles S. Petty, a pathologist and assistant medical examiner, and Dr. Henry C. Freimuth, a toxicologist in the chief medical examiner's office.

The intravenous (I.V.) bottle, detached and removed on the night of June 30, 1965, sealed with distinctively marked tape, remained in the refrigerator of the hospital medicine room until July 20, 1965. At that time it was removed by a nurse, who testified as to its markings and seal, and delivered to a police officer. The police officer in turn delivered it to Dr. Charles P. Larson, a Tacoma pathologist, who had been called to St. Joseph's Hospital for consultation on the night of June 30, 1965. Dr. Larson examined the markings and seal, locked the bottle in his evidence locker, and on January 19, 1966, delivered it for analysis to Dr. David A. Eagleson, a toxicologist and analytical chemist at the Tacoma General Hospital, who had also been present at the events occurring during the late night and early morning of June 30 and July 1, 1965, respectively, at St. Joseph's Hospital.

Dr. Eagleson testified that his analysis of the fluid in the intravenous bottle, a unit normally sealed with its contents by the manufacturer, although otherwise designed to receive injections of substances supplementary to its original contents, revealed approximately 1.39 milligrams of promazine per 50 cc's of fluid in the bottle. Promazine, otherwise known as sparine, was identified during the trial as a potent tranquilizing drug. Dr. Eagleson testified such a drug was not produced by the manufacturer of the intravenous bottle and its contents.

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1. The preparation referred to was accomplished by separating, through a centrifuging process, the respective blood samples into plasma and red blood cell components. The samples of the respective components were in turn marked for identification as units of the original samples.

Dr. Friemuth, the Maryland toxicologist, testified his analysis of the first urine specimen, covering the period from 9:45 p.m., June 30, 1965, to 2 a.m., July 1, 1965, revealed a concentration of free promazine in the quantity of 1 milligram per 100 cc's of fluid, in addition to breakdown products of promazine. He stated that his analysis of the second urine sample, covering the period from 12 o'clock noon to 2:30 p.m., July 2, 1965, indicated no free promazine, but did reveal breakdown products of the drug. He detected no other pertinent toxic substances in the urine samples.

Dr. Petty, the assistant medical examiner of Maryland, testified that comparison tests of the various blood samples were conducted under his supervision and control. He stated that such tests revealed the presence of an anti-cholinesterase agent in Mrs. Boehme's system on the night of June 30, 1965. This agent, he opined, was a drug of the carbamate class. Cholinesterase was described by the evidence as an enzyme, present throughout body tissues, which performs the function of transmitting brain impulses from the nerve circuits to the muscles. The introduction into the body of an anti-cholinesterase agent, under the evidence, thus would have the effect of impeding or arresting the conduction of vital and essential impulses from the brain to the muscular system. Dr. Petty further testified that the tests indicated a significant reduction in Mrs. Boehme's cholinesterase level on the night of June 30th, that brain injury would not cause such a diminishment and that the introduction of promazine into the system would accelerate the effects of any anti-cholinesterase agent then present in Mrs. Boehme's body.

The evidence introduced in support of a motive for the offense charged to the defendant, indicated that Mrs. Boehme was heavily insured and that the defendant was involved in an extramarital affair.

In response to the evidence adduced by the state, the defendant denied any action, effort or wish on his part to poison his wife. He presented testimony to the effect that Mrs. Boehme was emotionally unsettled;

that the tranquilizing drug promazine (sparine) had been prescribed to alleviate her condition; that events occurring during the day of June 29, 1965, unduly disturbed her; that she took an unusually heavy dosage of her tranquilizing drug on June 29th (upwards of 1500 milligrams), a fact which defendant did not discover until the late afternoon of June 30th; that such an overdose would account for the free promazine and the by-products thereof in the urine samples; that immediately following the blow to Mrs. Boehme's head in the boathouse on June 29th, defendant administered a hip injection of 1/6th of a grain of morphine to relieve her pain; that the introduction of eye drops with dilating propensities at the hospital in Bremerton was inadvertent and not immediately known to defendant; that when defendant visited his wife in the hospital on the evening of June 30th he asked to be alone with her so that they could pray together; that while alone with her defendant administered a hip injection of 20 milligrams of the drug ritalin, a mild stimulant, to offset the effects of her overdosage of promazine; that although defendant then examined the intravenous bottle he did not put anything into it; that any evidence of promazine in the fluid in the intravenous bottle was explicable only on the basis that it was not adequately guarded between the time of its removal on June 30, 1965, and analysis in January, 1966; that defendant visited his wife around 7 a.m., July 1, 1965, and found her well on the road to recovery, which confirmed his belief that the ritalin he had administered the night before had neutralized the overdose of promazine; that defendant's failure to fully advise the attending physician of the overdose of promazine, the morphine injection, the eye drops, and the ritalin injection was due to oversight, inablity to communicate with the doctor, or the unwise choice of alternatives rather than a deliberate act; that Mrs. Boehme's symptoms and the course of her recovery were consistent with and due to a head injury and the other factors involved rather than the result of any type of poisoning by defendant; that defendant was not in need of

money and, although he initially denied and then admitted an affair, the extramarital relationship with another woman was misguided and of no significance; and that defendant and Mrs. Boehme mutually loved, trusted, and respected one another at all times concerned.

In contradiction to the testimony relating to the presence of an anti-cholinesterase agent in any of the blood samples, the defendant presented the testimony of Dr. Charles H. Hine, a physician, toxicologist, and professor of toxicology employed by the University of California and associated with the San Francisco city and county coroner's department. Dr. Hine, in essence, questioned the sufficiency, accuracy, reliability, significance, and credibility of the conclusions drawn and presented by Dr. Petty in relation to the blood tests conducted under Dr. Petty's supervision. Dr. Hine's primary predicates in this respect were the length of time elapsing between the drawing of the blood and its processing, the limited number of samples tested, the differences between cholinesterase enzymes found in plasma and red blood cells, the lability of carbamate drugs in relation to cholinesterase enzymes, the variations in cholinesterase levels between individuals, as affected by different causes, the exactness required in testing, and the susceptibility of laboratory testing techniques to error. In short, Dr. Hine indicated that Dr. Petty's tests and conclusions were not worthy of any significant weight. He did not, however, directly attack the method or manner of testing employed by Dr. Petty.

Dr. Hine also assailed the significance of Dr. Friemuth's findings of promazine and the by-products thereof in the urine samples. This he did upon the basis that the quantities of promazine reportedly found in the urine samples betokened, at best, only a nonpoisonous and otherwise harmless intake of the drug. Dr. Hine further testified that in his opinion Mrs. Boehme's symptoms and course of recovery indicated a head injury rather than any bizarre type of poisoning.

Finally, Mrs. Boehme testified to the effect that she did not believe the defendant attempted to poison or harm her in any way and that she loved and trusted him and expected to continue to live with him as his wife.

Confronted with the foregoing circumstances and testimony, the jury found defendant guilty as charged.

On appeal, defendant makes 26 assignments of error. By way of argument in support of his assignments, defendant groups them into 8 categories. For convenience of discussion, we reduce the categories to 5. Our consideration will therefore revolve about claims of error directed to rulings of the trial court relative to (1) pretrial discovery; (2) physician-patient privilege; (3) admission of certain exhibits; (4) admission of certain medical testimony; and (5) procedural matters.

PRETRIAL DISCOVERY

In this category defendant directs his attention to the trial court's order denying his motion to require the state to furnish him copies of medical reports and the results of blood and urine tests.

The following resume is the pleading background to the pertinent order of the trial court. The information charging defendant with the offense involved was filed September 20, 1965. Arraignment followed on September 21, at which time defendant interposed a motion to make the information more definite and certain or, in the alternative, to require the state to answer specified interrogatories bearing upon the nature of the poison allegedly used and the manner and nature of its administration. The state was directed to answer the interrogatories in basic part, which it did by stating that the poison involved was an anticholinesterase agent and/or promazine administered in the hip of Mrs. Boehme at St. Joseph's Hospital. The defendant then pleaded not guilty and bail was fixed and posted. On or about October 1, 1965, the state served defendant with its list of witnesses, and, on October 11, 1965, defendant filed and served his

motion for production of reports and statements. The motion was couched in all inclusive terms requesting copies of "all written reports received from any doctor, professional, or expert person . . . including reports and discussions of tests performed upon the blood, tissues, parts, fluids, or products of the body of said Mary Boehme." Furthermore, the motion sought divulgance of any oral reports, as well as all laboratory reports regarding pertinent blood, fluid, or tissue tests. The motion came on for hearing and on October 21, 1965, the trial court entered its order providing as follows:

> IT IS HEREBY ORDERED that the plaintiff State of Washington shall state with particularity the disposition of any blood samples, tissues, parts, fluids or products of the body of Mary Boehme drawn or taken from her on or after the 29th day of June, 1965.
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> IT IS FURTHER ORDERED that it appearing that the defendant has not made a sufficient showing *at this time* that the other material sought by the motion is not available to him by other means, that all of the rest of the defendant's motion is denied. (Italics ours.)

At or about this time Mrs. Boehme, acting through defendant's counsel, in separate civil proceedings, sought and obtained orders from another department of the Superior Court for Pierce County restraining Dr. Durkin and the custodian of the records of St. Joseph's Hospital from divulging or releasing pertinent medical information and documents, and the prosecuting attorney from conferring with certain other medical witnesses. These orders were predicated upon the ground of a claim of the physician-patient privilege by Mrs. Boehme. Following these orders, it appears that various of the medical witnesses listed or expected to be called as witnesses by the state were advised by letter from counsel that Mrs. Boehme intended to claim the full benefit of her privilege as to any confidential information they might possess or divulge. From and after the trial court's order of

October 21, and the civil proceedings, it does not appear from the record that defendant renewed his motion for the production of any documents, reports or laboratory tests in the possession of the prosecution before the trial commenced on January 24, 1966.

At this point, we momentarily pause to observe that the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a two-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage. *State v. Robinson,* 61 Wn. 2d 107, 377 P.2d 248 (1962); *State v. Gilman,* 63 Wn. 2d 7, 385 P.2d 369 (1963); *State v. Peele,* 67 Wn.2d 893, 410 P.2d 599 (1966).

In view of all of the circumstances appearing, including the fact that the trial court's order contained an inherent invitation to defendant to renew his motion and present a more adequate showing of necessity, we are convinced this claim of error falls squarely within the ambit of our holding in *State v. Mesaros,* 62 Wn.2d 579, 384 P.2d 372 (1963), wherein we said at 587:

> There appears to be a growing tendency, not only in this state, but in other jurisdictions as well, to liberalize the right of a defendant to discovery in criminal cases. See *Powell v. Superior Court,* 48 Cal. (2d) 704, 312 P. (2d) 698 (1957), and *Walker v. Superior Court,* 155 Cal. App. (2d) 134, 317 P. (2d) 130 (1957). The *Thompson* case would appear to follow the same philosophy and reasoning, but it must be remembered that all of these cases are based upon the same fundamental rule that the granting or denial of a defendant's motion for discovery rests within the discretion of the trial court and will not be dis-

turbed in the absence of a manifest abuse of discretion.

In the instant case, the court granted a portion of appellant's motion for inspection and reserved the right to him to renew this motion on a further showing of necessity. Although he prepared an additional motion, he failed to present it to the court. In other words, the court opened the door to him but he failed to enter. There is no way that this court or anyone else can now discover what the court's ruling might have been, had this motion been further urged and proper showing made in support of it. The court was not given an opportunity to exercise its discretion, although the record indicates a liberal and fair attitude. Under the circumstances of this case, we find no error in the court's failure to grant further discovery.

We so hold in this case.

PHYSICIAN-PATIENT PRIVILEGE

As indicated in our discussion under the preceding category, it became apparent early in the course of this case that Mrs. Boehme intended to claim the physician-patient privilege as to information gained by the physicians and hospital personnel who attended her between June 29 and July 16, 1965. This she did through defendant's counsel acting on her behalf, both by way of civil actions seeking to restrain their testimony as well as asserting the privilege at defendant's trial.

The trial court denied Mrs. Boehme's claim of privilege and overruled defendant's objections to the pertinent testimony. Defendant assigns error, contending that the trial court's action abrogates the privilege and/or constitutes an invasion of Mrs. Boehme's constitutional right of privacy.

We cannot agree with defendant.

At common law, no testimonial privilege existed between patient and physician as to communications or

information passing between them. The privilege, as we accept it today is the creature of statute, and as such is a procedural safeguard rather than a rule of substantive or constitutional law. The applicability, therefore, of the privilege in a given situation turns upon the language and interpretation of the pertinent statutory provisions.

In this state, the significant statutory provisions are RCW 5.60.060(4), 10.58.010, and 10.52.020, which respectively provide:

> A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient, but this exception shall not apply in any judicial proceeding regarding a child's injuries, neglect or sexual abuse, or the cause thereof. RCW 5.60.060(4).
>
> The rules of evidence in civil actions, *so far as practicable*, shall be applied to criminal prosecutions. RCW 10.58.010. (Italics ours.)
>
> Witnesses competent to testify in civil cases shall be competent in criminal prosecutions, but regular physicians or surgeons, clergymen or priests, shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character; . . . RCW 10.52.020.

The judicially proclaimed purpose of statutes such as ours, establishing the privilege, is to surround communications between patient and physician with the cloak of confidence, and thus allow complete freedom in the exchange of information between them to the end that the patient's ailments may be properly treated. *State v. Miller,* 105 Wash. 475, 178 Pac. 459 (1919).

In the last cited case (*State v. Miller, supra*), we construed the foregoing statutes to mean that the

privilege provided by RCW 5.60.060(4) was, by virtue of RCW 10.58.010, extended to criminal prosecutions, in the sense that a defendant, standing charged with a crime, could claim and assert the privilege as to the testimonial knowledge of a physician acquired in the course of professionally treating such defendant. Despite the fact that our sister states of California,[2] Oregon,[3] Idaho,[4] Montana,[5] and Utah[6] have otherwise applied analogous statutory provisions, we have steadfastly adhered to our ruling in the *Miller* case. *State v. Sullivan,* 660 Wn.2d 214, 373 P.2d 474 (1962); *State v. McCoy,* 70 W.D.2d 935, 425 P.2d 874 (1967).

We have, however, refused to permit an accused person to claim the privilege arising between an *examining* physician and the victim of the accused person's crime. *State v. Winnett,* 48 Wash. 93, 92 Pac. 904 (1907); *State v. Thomas,* 1 Wn.2d 298, 95 P.2d 1036 (1939); *State v. Fackrell,* 44 Wn.2d 874, 271 P. 2d 679 (1954). Although none of these cases dealt directly with the right of an accused to claim the priilege arising between the victim and his or her *treating* physician, we did note in the *Fackrell* case, at 878, that

> The former decisions of this court fit into the rationale of the majority rule set forth by R. P. Davis in an annotation entitled "Right of one against whom testimony is offered to invoke privilege of communication between others," appearing in 2 A.L.R. (2d) at 647, wherein it is said:
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> "The weight of authority supports the view that the doctrine of privileged communications as between physician and patient, usually incorporated in statutory enactments, is intended for the

2. *People v. Gonzales,* 182 Cal. App. 2d 276, 5 Cal. Rptr. 920 (1960).

3. *State v. Betts,* 235 Ore. 127, 384 P. 2d 198 (1963).

4. *State v. Bounds,* 74 Idaho 136, 258 P. 2d 751 (1953); *State v. Coburn,* 82 Idaho 437, 354 P. 2d 751 (1960).

5. *State v. Campbell,* 146 Mont. 251, 405 P. 2d 978 (1965).

6. *State v. Dean,* 69 Utah 268, 254 Pac. 142 (1927).

benefit of the patient, and that the defendant in a criminal prosecution has no right to object to the testimony of a physician concerning communications made by the victim of the crime to such physician, or information gained from the victim by the physician, in his professional capacity."

We find no reason asserted in our cases, in our application of our statutory provisions, or in the statutory provisions themselves which would require a departure or a deviation from the majority rule recognized and cited in the *Fackrell* case.

Accordingly, we hold that the defendant could not assert the doctor-patient privilege flowing to Mrs. Boehme as the patient and asserted victim of the alleged crime.

This, then, leaves the question of the efficacy of Mrs. Boehme's claim, as patient-victim, of the privilege.

In this respect, it is generally recognized and accepted that the privilege is essentially one intended for the benefit of the patient, and is one personal to the patient. *State v. McCoy, supra.* This approach is in keeping with the underlying purpose of the privilege, that is, to facilitate and safeguard a free exchange of information in the course of treatment. A further purpose has also been occasionally noted — that of protecting the patient from embarrassment, scandal, or incrimination which might flow from the revelation of intimate details connected with the medical treatment of physical ills. These purposes are benevolent and wholesome. They fully warrant and justify the privilege in appropriate cases.

The privilege, however, should be fairly limited to its purposes. Absent the most cogent of reasons, it should not, by unrealistic or impractical application, become a means whereby criminal activities of third persons may be shielded from detection, prosecution, and punishment, however magnanimous, compassionate or conciliatory the victim might otherwise wish to be. To allow the privilege to thus become a device

by which the victim of an attempted crime could, without a civically paramount reason; thwart the course of a criminal proceeding against the perpetrator might well promote greater evils than the privilege was designed to avoid. The maintenance of an orderly society, and the circumvention of criminal activities, are functions of government which should not be subject to casual suppression by the operation of a procedural rule primarily designed for the purpose of aiding in the healing of physical ailments. *Cf. People v. Lay,* 254 App. Div. 372, 5 N.Y.S. 2d 325 (1938), *aff'd.* 279 N.Y. 737, 18 N.E.2d 686 (1939); *Wimberly v. State,* 217 Ark. 130, 228 S.W.2d 991 (1950); *State v. Antill,* 176 Ohio St. 61, 197 N.E.2d 348 (1964).

In the instant case, we can conceive of little additional embarrassment or humiliation visited upon Mrs. Boehme by virtue of admission of the challenged evidence than that occasioned by the bringing of the charges in the first instance. Likewise, the testimony of the treating physicians and/or hospital personnel by no manner of means subjected her to any form of criminal liability. Moreover, we cannot visualize any significant public interest which would be served by foreclosing a full judicial investigation of the charges here preferred.

Bearing in mind that the legislature, by RCW 10.58.010, in effect, attached a condition of practicality to the application of the physician-patient privilege in criminal prosecutions, we conclude that the trial court did not err in overruling Mrs. Boehme's claim of the privilege under the circumstances prevailing in the instant case.

ADMISSION OF CERTAIN EXHIBITS

By his assignments of error falling in this category, defendant challenges the admission into evidence of the blood and urine samples and the intravenous bottle with its contents. In this vein, he argues that the state failed to sufficiently establish the identity of the exhibits, the chain of custody through which they passed, and the freedom from possible contamination.

We find no reversible error within the framework of defendant's contentions.

The applicable rule, distilled from a pertinent annotation in 21 A.L.R. 2d 1216 (1952) and later cases, is succinctly summarized in 29 Am. Jur. 2d *Evidence* § 775 (1967) at 845:

> When objects, such as bullets, specimens, or parts taken from a human body, are produced in court and used there as an exhibit or made the basis for the testimony or report of an expert or officer, the identity of the object produced with the object taken from the body must be proved. Proof of this identity involves showing that the thing was taken from the particular body from which it was supposed to be taken, and that thereafter it was properly kept and, if necessary, transported and delivered to the one who produced it at the trial or the expert who analyzed or examined it.

Our review of the evidence presented satisfies us that the state fully complied with the requirements of the rule. Without detailing the testimony, it is sufficient to say that the state, through the testimony of the participating hospital, medical, and law enforcement personnel, methodically traced the identity, markings, custody, storage, preparation, and transportation of the respective samples and specimens from Mrs. Boehme's body and hospital room to the hands of the analyst. Time factors, and the potential effect thereof upon ultimate analysis, were fully explored and explained by the competing experts. And, beyond mere speculation and innuendo, there is not the least indication in the evidence that the questioned exhibits were anything other than what they were represented to be or that they were contaminated in the course of their journey to the testing laboratory.

The trial court did not err in admitting them into evidence. The weight to be accorded to the exhibits was for the jury.

ADMISSION OF CERTAIN MEDICAL TESTIMONY

Defendant, by his assignments of error in this category, focuses attention upon the results of the chemical tests performed on the blood samples, as related by Dr. Petty, the Maryland pathologist.

In this regard, the testimony essentially reveals that after the respective samples came into his possession Dr. Petty and his assistant, a graduate chemist, working together in their laboratory facility, prepared the samples for analysis by the titrimetric or titration method. Thereafter, Dr. Petty's assistant took the prepared samples to a second laboratory, which, by the terms of a contract existing over a number of years, made available an automatic titrating machine for Dr. Petty's use. At this point, Dr. Petty's assistant placed or participated in placing the samples in the machine, observed the operation of the machine, recorded the outcome, and returned with the information to Dr. Petty's laboratory. There, Dr. Petty and his assistant correlated and compared the data with data from control samples, evaluated the analysis and determined the final result of the tests. Dr. Petty testified that his assistant was subject to his direction and that the process of analysis was under his supervision and control. Although a defendant's expert, Dr. Hine, stressed the need for accuracy, he did not directly criticize the procedure or method of testing employed by Dr. Petty.

Defendant's assignments of error arise out of the fact that Dr. Petty's assistant was not called as a witness and Dr. Petty did not personally observe the operation of the automatic titration machine. The epitome of the contentions is concisely expressed in the following excerpt from defense counsel's objection to the challenged testimony during trial:

> In fairness to the witness, I believe he stated the tests were performed under his supervision, and the issue that I was making is that super-

vision is not sufficient unless it includes observation, ...

We were confronted with a similar challenge in the case of *State v. Rutherford,* 66 Wn.2d 851, 405 P.2d 719 (1965). After analogizing the situation there presented to the Uniform Business Records Act, RCW 5,45.020, and the underlying purposes of that act, we discussed and distinguished the principal cases relied upon by defendant (*State v. Baker,* 56 Wn.2d 846, 355 P.2d 806 (1960) and *Seattle v. Bryan,* 53 Wn.2d 321, 333 P.2d 680 (1958)) and stated at 855:

> We conclude that the trial court did not abuse its discretion in permitting the witness to give the results of tests performed under his supervision and control, even though he did not personally conduct the tests or witness their performance.

Although we cannot, under the circumstances of this case, applaud or commend the state's failure to call Dr. Petty's assistant as a witness, we are not persuaded that the trial court committed reversible error in admitting Dr. Petty's testimony.

PROCEDURAL MATTERS

The errors assigned by defendant in this category are directed to (a) a trial amendment of the information, (b) the giving of instructions embracing the matter contained in the trial amendment, (c) defendant's challenge to the sufficiency of the evidence, (d) newly discovered evidence bearing upon the credibility of a witness, (e) evidence suggesting prejudice on the part of a juror, and (f) the publicity attendant upon the charges and the trial. Defendant contends the claimed errors individually and/or cumulatively deprived him of due process of law and a fair trial.

It would unduly prolong this opinion to discuss each claim of error in detail. Suffice it to say we have carefully reviwed and evaluated the various assignments standing alone and in the aggregate and are not persuaded that any reversible error flows therefrom. Defendant was competently, intelligently and

energetically represented at all stages of the proceeding. The character, nature, and extent of the evidence presented in his defense reflects ample pretrial information and preparation. All significant procedural and technical issues presented were countered. The publicity attendant upon the case cannot be equated with that found in *Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed. 2d 600, 86 Sup. Ct. 1507 (1966). Post trial matters were carefully considered and weighed by the trial court and we find no basis warranting the substitution of our judgment in these matters for that of the trial court. The evidence presented by the state, if believed by the jury, was ample to sustain the verdict.

We conclude that defendant received a fair trial and was accorded due process of law.

The judgment is affirmed.

HAMILTON, *J.*

We Concur:

FINLEY, *C.J.*
HILL, *J.*
DONWORTH, *J.*
WEAVER, *J.*
ROSELLINI, *J.*
HUNTER, *J.*
BARNETT, *J. Pro Tem.*

APPENDIX C

REMITTITUR

No. 38826

Pierce County No. 35845

THE STATE OF WASHINGTON,
Respondent,
v.
ROBERT E. BOEHME,
Appellant.

THE STATE OF WASHINGTON TO:

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 18, 1967, became the final judgment of this court in the above entitled case on December 8, 1967. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: No cost bill having been filed, costs are deemed waived.
WML:dm

cc: Court Reporter
Mr. Frank A. Peters
Hon. Ronald G. Hendry, Prosecuting Atty.
Mr. Edwin J. Wheeler, Deputy

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of December, A.D. 1967.

WILLIAM M. LOWRY,
Clerk of the Supreme Court, State of Washington.

APPENDIX D

APPLICABLE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES

1. Fourth Amendment

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . . "

2. Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . "

3. Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense."

4. Ninth Amendment

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

5. Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction threof, are citi-

zens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX E

REVISED CODE OF WASHINGTON

§ 9.11.010 *Assault in the First Degree Defined—How Punished.* Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another. . . .

(2) Shall administer to or cause to be taken by another, poison or any other destructive or noxious thing so as to endanger the life of another person, shall be guilty of assault in the first degree and shall be punished by imprisonment in the state penitentiary for not less than five years.

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IN THE

Supreme Court of the United States

October Term 1967

No. 1052

ROBERT E. BOEHME,
Petitioner,
v.
STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR RESPONDENT IN OPPOSITION

JOSEPH D. MLADINOV,
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State of Washington, Respondent.

Date: March 25, 1968.

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IN THE

Supreme Court of the United States

October Term 1967

No. 1052

ROBERT E. BOEHME,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Judgment and Sentence to not more than 20 years for the crime of Assault in the First Degree (as defined by Revised Code of Washington, 9.11.010, Appendix C hereto) in the Superior Court of the State of Washington in, and for, Pierce County was entered on March 15, 1966 (Petition, pp. A-1 to A-2), without a written opinion, upon the unanimous verdict of the Jury on February 6, 1966, after the Motion for a New Trial was denied on March 9, 1966.

The opinion of the Supreme Court of the State of Washington, *en Banc,* unanimously affirming that Judgment and Sentence on July 18, 1967, is reprinted in Appendix A hereto, and is reported in 430 P.2d 527, 71 Wash. Dec. 2d 609. A Petition for Re-

hearing was denied on December 8, 1967. The Remittitur is dated December 14, 1967 (Petition p. A-24).

A Stay of Judgment was denied by the Supreme Court of the State of Washington. This honorable Court also denied a Stay on December 14, 1967, and Petitioner is now in prison in the State of Washington.

JURISDICTION

Petitioner is invoking (Petition p. 2) the jurisdiction of this honorable Court pursuant to 28 U.S.C. § 1257 (3):

> ". . . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . . "

because Petitioner is asserting title, rights, privileges and immunities under the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution (Petition, p. 2):

Petitioner has noted also (Petition, p. 2):

> "the rules of this Court under which the Petition lies are Rule 19, providing for Certiorari to the State Courts; Rule 22, allowing a petition to review a judgment of a state court to be filed within 90 days after the final entry of such judgment; and Rule 23 prescribing the form and contents of the petition."

QUESTIONS PRESENTED

1. In a criminal prosecution of a husband for the attempted murder of his wife, are the rights of either of them, under the Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United

States, or their Right to Privacy, violated by the trial Court's requiring the doctors to testify to her symptoms, and to their treatment of her, when both the husband and wife object to such disclosures at his trial?

2. Is it a violation of the Sixth and Fourteenth Amendments to the Constitution of the United States for a Washington State Trial Court to permit a Medical Examiner from Maryland to testify to the analyses of the wife's blood after tests run partly by him, partly by his chemist under his direction, and partly by others in the presence of that chemist?

3. When an Information charges an attempted murder by "poison or other destructive or noxious thing", and by pre-trial particulars Petitioner is informed that it was done by injection into a named part of the body, is it a violation of the Sixth and Fourteenth Amendments to the Constitution of the United States to permit testimony about another way, and another part of the body when that was not known by the State until trial?

4. On the record here, was Petitioner deprived of his right to a fair trial under the Fifth, Sixth, Ninth, and Fourteenth Amendments to the Constitution of the United States, and under this honorable Court's decision in *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (June 6, 1966)?

5. Where a witness for the State, who was a mistress of Petitioner, and whose testimony goes to motive of the attempted murder of Petitioner's wife by

him, testifies that no charges on other unrelated matters are pending against her in another County, and Prosecuting Attorney of our County so states so far as he knows, and witness has corroboration (letters from Petitioner) for some of her testimony, have Petitioner's rights under the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States been violated when it later develops that there were in fact such charges pending, which, since Petitioner's conviction, have been dismissed?

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The constitutional privisions under which Petitioner claims title, rights, privileges and immunities are the following Amendments of the Constitution of the United States: the Fourth, Fifth, Sixth, Ninth and Fourteenth. Also involved is the Constitution of the State of Washington, Art. 1, § 2, (Amendment 10). All these constitutional provisions are reprinted in Appendix B.

The Statutes of the State of Washington here involved include the following provisions of the Revised Code of Washington (RCW): 5.45.020; 5.60.060, subds. 1 and 4; 9.11.010; 10.52.020; 10.55; 10.58.010. All these statutory provisions are reprinted in Appendix C.

RULE OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON INVOLVED

The Rule of the Superior Court of the State of Washington involved was Rule 101.04W, subd. 2, of

the Rules of Pleading, Practice, and Procedure (RPPP), which, effective July 1, 1967, is now Rule of Criminal Procedure (Cr. R.) 101.04 W, subd. b.

This Rule, past and present, is reprinted in Appendix D.

COUNTER-STATEMENT OF THE CASE

In accordance with this honorable Court's Rule 40 (3), the State submits the following Counter-Statement.

Petitioner, a medical doctor, was charged by Information, with attempting to murder his wife, "by poison, or any other destructive or noxious thing" (Tr. 1). After a trial for 2 weeks, he was convicted by a Jury, and sentenced to not more than 20 years (Petition, p. A-1 et seq.).

Most of the State's evidence consisted of the testimony of medical witnesses.

Dr. Strehlow, a general practitioner, who spends all of his time in internal medicine (St. 245), and who, for 3 years had been the victim's physician, she generally enjoying good health (St. 246), was called by Petitioner about midnight on June 29, 1965 to come to a hospital in Bremerton (Kitsap County). He found Petitioner's wife there in the emergency room "drifting in and out of a coma". Petitioner told him a heavy beam had fallen on her head. She was "too critical to be examined completely" (St. 246-247). Neither X-rays, nor the outside of her head, showed any injury. He did a spinal tap; fluid discharged un-

der pressure (St. 248, 1058), and it was bloody. Her condition was critical. That doctor ordered an ambulance to take her to a Tacoma (Pierce County) hospital "as rapidly as possible" (St. 249), and for a Dr. Durkin, a neurologist and neuro-surgeon, to meet her there. Petitioner rode in the ambulance with his wife (St. 852-854).

Dr. Durkin met the ambulance at 1:30 a.m.; he was puzzled by her symptoms; she was semi-comatose; her respiration was poor; her abdomen was hard as a board; muscles all over her body were "jumping"; the only evidence of any blow was a small abrasion across the right side of her neck (St. 255-259).

No medication was given; no surgery was done. At about 3 a.m. she stopped breathing momentarily, and a respirator was used on her a few minutes later (St. 761). At 5 a.m. she was having trouble breathing; she was breathing about 4-8 times a minute; she was "deeply unconscious", responded to no stimuli (St. 762-763). By 8 a.m. her rate of breathing was worse, so a tube was inserted into her windpipe so the automatic respirator would work efficiently (St. 264, 764); she was "very, very close to death" (St. 763-764); she had "less than a half an hour" to live if it were not for the automatic breathing machine (St. 764). The machine did "all the breathing for her" (St. 764). Her pupils were "very, very widely dilated"—"something you see rarely except under the influence of certain drugs or when a patient is about to die" (St. 764).

Petitioner had gone home while much of this was

occurring, to care for his own patients (St. 265); Dr. Durkin had been checking the victim's condition by telephone every 15-20 minutes (St. 264). When Petitioner came to the hospital about 8 a.m., he was told there was not much "hope that she would live through this" (St. 264).

However, by 9:30 a.m. she was improving (St. 1006); and by 1:30 p.m. she could breathe by herself, her abdomen was not so hard, and her pupils were less dilated (St. 265). At about 2 p.m. she was connected to an "I.V." bottle of glucose which would empty in about 12 hours (St. 664-665). By 7:45 p.m. she could talk, and coherently, had relatively normal reflexes, and the windpipe tube was removed (St. 265-266; 267-268). He then called Petitioner, said she had "suddenly, suddenly, magically come out of a very bad situation", and that "she looked like she was going to make this without any problem" (St. 268); so about 9 p.m. Dr. Durkin went home (St. 268). Five minutes later her special nurse (Otto) left her with a senior student nurse (Yates) (St. 357, 374). About 5 minutes after that Petitioner came into the room. He asked the student nurse how his wife was; he was told she was "improving or she was responding"; he asked if he could be alone with his wife for a few moments, and she agreed (St. 375, 376). She returned in a few minutes after reporting it to her charge nurse (Wold; St. 376). His right hand, closed, was on the bed by his wife's buttocks (St. 378); he put his hand into his pocket, took his hand out, and put it on her hip, on top (St. 378), with his hand open this time

(St. 378). He asked if he could be with his wife a few moments longer, and the student nurse said "yes, reluctantly" (St. 377); and he leaned over and kissed his wife (St. 378); she left the room, reported it to the charge nurse, and they returned, and entered the room in about 3 minutes (St. 379).

The Petitioner "left right away", and "didn't say anything before leaving" (St. 379).

She examined her patient in the presence of her charge nurse (Wold) and her instructor (Abbott); on the victim's right buttocks "there was a droplet of blood and it appeared to be oozing from an injection site" (St. 379). She left the room to get the emergency rescusitator, met Dr. Pratt, an anethesiologist, in the hall (St. 379), "told him that Mary had gotten worse, and would he please go in the room" (St. 380).

Dr. Pratt went into the room saw that "she was dying", he used emergency steps to restore breathing (St. 325-327); her eyeball did not respond to touch, there was no response to light, abdomen was rigid, and there was twitching in her fingers and toes (St. 329). Nurse Otto saw the blood from the puncture in the buttocks (St. 360), and so did Dr. Pratt (St. 331); he "ordered an immediate blood sample to be drawn", and it was done in his presence (St. 329).

At 9:30 p.m. Dr. Durkin received "a frantic phone call from the nurse"; he returned to the hospital within 7 minutes (St. 269), and found his patient "dying". "She was not breathing", but her color was good, and she had the same set of "bizarre" symptoms

she had the night before in the emergency room (St. 269-270-274). He examined her, found the fresh blood on her buttocks; her abdomen "was board hard"; and she "had no reflexes anywhere" (St. 270). He realized then "I was not dealing with a head injury but my patient had in some manner been poisoned" (St. 270). He then called in for consultation other medical specialists: in internal medicine, pathology, toxicology, and a bio-chemist (St. 273-274). There was general agreement that she had been poisoned (St. 1061, 1043, 1073, 1044, 1062).

Dr. Pratt testified that he was "probably an expert in recognizing poisoned patients" (St. 1063), because he was a doctor and anesthesiologist of 20 years' experience with "probably over 100,000 patients that have been poisoned under controlled conditions" (St. 1062); in his opinion, "she had been poisoned with some exotic type of poisoning" (St. 1061).

Dr. Dean, a physician and anesthesiologist, who had examined her also, testified that if the symptoms she had were from a head injury, "her brain would have turned to mush" (St. 1073).

One other expert testified for the State, based only on the records, that she had been, in his opinion, poisoned (St. 1114).

The Petitioner's expert, with distinguished training and experience (St. 903-908), was from California, and was limited necessarily, therefore, to opinion evidence; he said her symptoms were attributable to a "serious heady injury" (St. 949).

The blood and urine samples, and the "I.V." bottle were all, analyzed.

The urine sample contained free Promazine (St. 499), which is one of "the more potent tranquilizing agents" (St. 499).

The "I.V." glucose bottle, into which a hypodermic needle could be injected while the bottle is still connected to the patient (St. 720-722) was analyzed, and it, too, contained Promazine (St. 699). This was the bottle which Petitioner, at trial, admitted he had "handled" while he was alone with his wife (St. 827-828).

The blood samples were analyzed by Dr. Petty, a Maryland specialist, and his assistant, Mr. Orindorff, a chemist. He concluded that a poisoning agent in the blood had interfered with an ingredient in the blood which is essential to transmit nerve impulses (St. 515-517); and without that ingredient functioning properly, "proper movement of the muscles would not be possible" (St. 517).

Petitioner testified on his own behalf.

He said a plank fell on her head while they were in the boathouse (St. 807). He immediately gave her in the right hip (St. 861), a morphine injection (St. 810), though she had been knocked out at first by the plank (St. 808), and morphine should not be given to unconscious people (St. 861-862). The dilation of her eyes was because he had to get her contact lenses out by floating them off with some liquid from a nearby eye bottle at the emergency room of the first (Brem-

erton) hospital (St. 812), and it had the wrong solution (St. 812), which made her eyes dilate (St. 812).

It should be noted that a nurse, on rebuttal, saw him remove the contact lenses, saw no eye-tray, and said he put no drops in her eyes (St. 1147-1148).

Petitioner said his wife had serious emotional problems (St. 780-790) and he had been giving her a tranquilizer called Sparine; and she had taken too many of them the day the plank fell on her (St. 780-790).

He wanted to be alone with her in the hospital room so they could pray together (St. 826), and so he could give her an injection of Ritalin in the right hip (St. 826), and that was as "an antidote" for the too much Sparine he thought she had taken (St. 826).

His wife was insured for $173,000 (St. 855-856) and he was the beneficiary (St. 855).They had funds, however; they had recently purchased a $38,000 boat (St. 860); and a year before this near-death, he had taken 17 friends and relatives to Hawaii (St. 996).

One of his patients, a Wanda Ostby, testified that, while she was still married, she had an affair with Petitioner (St. 172-180), and that, for a time they were meeting almost every Thursday night (St. 177); that Petitioner had told her that "Mary would never give him a divorce" (St. 179); that "he had no doubt that Mary would strip him of everything" (St. 179); that he would "take care of Mary" (St. 180, 181); that he then "grabbed" her arm, and asked, "You little fool, don't you understand what I am trying to tell you?"

Petitioner interrupted to say that she was "committing perjury" (St. 179).

When he testified in his own defense, he admitted she was a patient (St. 832); he admitted giving her money as a matter of charity (St. 837); he never had any other relationship with her (St. 835).

He admitted receiving letters from her (St. 839); "she was a pest, but I did my best" (St. 839). He admitted writing her 6-8 letters while she was in California (St. 839). He admitted that Ex. 49 (St. 840), was apparently in his handwriting and it said "Destroy all mail" (St. 841). She did not. When confronted with some of his messages to her (Exs. 49, 50, 51, 52; St. 839-845), he admitted he had seen her not once, but rather 3-4 times in California (St. 845); and he admitted that, although "Morality is a matter of degree" (St. 899), he had had relations with her some number of times (St. 899); that the reason he had not been frank either on the stand or to his counsel was:

> "Because I was ashamed to admit that I had been having an affair with a town prostitute and because I wanted to spare my family that indignity and because in 17 years of practice trying to do what I could. . . . (St. 900).

And he denied, again, that he, in any manner, ever intended to hurt his wife (St. 901).

ARGUMENT AS TO ISSUE I

Petitioner, who was a licensed physician, is suggesting (Petition, p. 3, 11, 13) that he was denied his rights under the Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States by the trial Court's (1) permitting the State to try

him for the attempted murder of his wife, and (2) compelling the physicians who treated the wife and rescued her from the brink of death from poison, to disclose to the Court and Jury the communications of the wife-victim-patient to them—in both instances, Petitioner suggests, thus violating the constitutional Right of Privacy between doctor-husband, wife-victim-patient, and her rescuer-doctors.

As this honorable Court has noted recently:

> ". . . . . Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution."

See: *Katz v. United States,* .... U.S. ....., 88 S. Ct. ...., 19 L. Ed. 2d 576, at 581, n. 5 (Dec. 18, 1967).

Petitioner cites no authority directly in point for his position. Since no crime by husband against wife was involved in them, recent decisions of this honorable Court implementing the Rights of Privacy cannot be wrenched into support for his position. See: *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (June 7, 1965); *Poe v. Ullman,* 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (June 19, 1961), rehearing denied 368 U.S. 869, 82 S. Ct. 21, 7 L. Ed. 2d 69 (Oct. 9, 1961).

In the recent words of Mr. Justice Harlan, Petitioner's suggestion would appear to be "one savoring of a disingenuous constitutional contention". See: *Smith v. Illinois,* .... U.S. ...., 88 S. Ct. ...., 19 L. Ed. 2d 956, at 961 (dissenting, Jan. 29, 1968).

Questions of marital privilege, and doctor-patient privilege are, of course, constitutionally a matter of State concern. In the State of Washington that concern, and the judgments concerning it, are all expressed in the Statutes, RCW 5.60.060, subd. 1 and 4; and RCW 10.52.020, which are, by RCW 10.58.010, applicable to criminal actions "so far as practicable", as well as to civil actions. These statutes are set out in the Appendix C hereto.

These statutes were considered by the Supreme Court of the State of Washington and were interpreted as unavailing in this setting. Accord: *Annotation,* 2 ALR 2d 645, at 647; see and compare, *Annotation,* 7 ALR 3rd 1458.

Petitioner would appear, therefore, to bottom his position on the fact that his wife has asserted his innocence, and that she, as well as he, of course, objected to his prosecution for his attempted murder of her, assuming, apparently that they, together, rather than the State, "own" this case. Petitioner would gloss over the view that attempted murder of a woman, albeit one's wife, is an act, in the words of the Criminal Information, "against the peace and dignity of the State of Washington." In even less serious situations than the one at Bar, the Supreme Court of the State of Washington has long recognized that:

> "The case, after the complaint is filed, is no longer a matter of private concern, but has partaken of all the attributes of a public offense, and the injured spouse should have no more right to control the further disposition of the case than should the complaining witness in any other criminal action.

See: *State v. Astin,* 180 Pac. 394, at 394, 106 Wash. 336, at 337, 4 ALR 1335, at 1336 (Apr. 3, 1919); noted in Wharton, Criminal Law (12th ed.), § 2094; 69 Yale L. J. 556; and *State v. Camp,* 430 P. 2d 187, at 187, 71 Wash. Dec. 2d 607, at 608 (*per curiam,* July 13, 1967). See, and compare, Comment, *Marital Privileges and the Right to Testify,* 34 Univ. of Chicago L. Rev. 196-210 (No. 1, Autumn, 1966).

The State knows of no doctrine, constitutional or otherwise, rendering this view impermissible.

ARGUMENT AS TO ISSUE II

Petitioner is suggesting (Petition, p. 3, 11, 13-16) that he was deprived of the right guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States to be confronted by the witnesses against him, when the trial Court admitted into evidence against him the results of certain chemical tests.

There is no merit to this suggestion.

At the threshold Petitioner must acknowledge that this honorable Court does not

> ". . . . . sit as a court of criminal appeals to review state cases. The States are free to provide such procedures as they choose, including rules of evidence, providing that none of them infringes a guarantee in the Federal Constitution."

See: *Burgett v. Texas,* 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319, at 324 (Nov. 13, 1967). In an earlier day, Mr. Justice Cardozo, speaking for this honorable Court also acknowledged this view that each State

". . . . . is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

* * * * *

"Nor has the privilege of confrontation at any time been without recognized exceptions, * * * The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule."

See: *Snyder v. Massachusetts,* 291 U.S. 97, at 105, 107, 54 S. Ct. 330, 78 L. Ed. 674, at 677, 679, 90 ALR 575, at 579, 580 (Jan. 8, 1934). Accord: *Kay v. United States,* 255 F. 2d 476, at 480-481 (USCA-4, May 17, 1958), cert. denied, 358 U.S. 825, 79 S. Ct. 42, 3 L. Ed. 2d 65 (Oct. 13, 1958), where that Court noted:

"Neither the Sixth Amendment to the Constitution of the United States, nor Article I, Section 8 of the Constitution of Virginia can be said to have incorporated the rule against hearsay evidence, as understood at the time of their adoption. Each was intended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule.

"The power of the Congress and of a state legislature to provide for the admission of evidence is not subject to any such arbitrary limitation as the defendant supposes. They may carve out a new exception to the hearsay rule, without violating constitutional rights, where there is a reasonable necessity for it and where it is supported by an adequate basis for assurance that the evidence has those qualities of reliability and trustworthiness attributed to other evidence admissible under the long established exceptions to the hearsay rule." (255 F. 2d at 480-481).

See and compare: Hon. Talbot Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise,* 54 ABAJ 231 (March 1968), suggesting that any "rule with thirty-two (or more) exceptions is no rule"; see, however, Note: *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials,* 113 Univ. of Pa. L. Rev. 741 (March 1965).

In the case at Bar the testimony to which Petitioner takes such exception was given by a Dr. Charles S. Petty, who, at the time of the trial (January-February 1966) was, and since July 1958 had been, Assistant Medical Examiner for the State of Maryland in Baltimore, and was an Associate Professor for Forensic Pathology at the University of Maryland School of Medicine, and an assistant in the John Hopkins University School of Hygiene and Public Health (St. 513 N).

For 3 years before that (1955-1958) he was Instructor, and then Assistant Professor, in Pathology at the Louisiana State School of Medicine in New Orleans, and at the same time was the pathologist or coroner for the Parish (County) of New Orleans (St. 513M-513N).

His education and training was as follows: 1941 Graduate in Pharmacy from University of Washington; after World War II, in 1946, came back to receive an M.S. in Physiology; graduated from the Harvard Medical School in 1950; interned at Cooperstown, New York, for 2 years; then he became Chief Resident Pathologist at Peter Brigg Memorial Hos-

pital in Boston; then, also, at Children's Medical Center in Boston; and, finally, Senior Resident in Pathology at The New England Deaconess Hospital in Boston (St. 513M).

That Dr. Petty testified that

> ". . . . . part of certain tests were performed by me, and part of that [sic] same tests were performed under my supervision by my own personnel." (St. 521).
>
> * * * * *
>
> ". . . . . I personally performed part of the analysis, but generally speaking what I did was to see to the layout of the test procedure, to watch for the proper pipetting, or measuring of the test materials, and reactions, and then to follow the test results as they were developed. (St. 523).

Dr. Petty testified that part of the tests were done by one of his employees (Orindorff) who has a Bachelor's degree in Chemistry, with certain credits toward a Master's, and was currently working toward a Doctor's (St. 645); he had been his employer for about 3½ years (St. 537).

Dr. Petty further testified that some of the tests were run on specialized equipment (St. 535), owned by the United States Government (St. 645) at the U.S. Army Chemical Center at Edgewood, Maryland (St. 523, 535), with which, for about 10 years, Dr. Petty and his assistants had a contractual relationship (St. 535)—as he puts it—

> ". . . . . we analyze with them, and they analyze things for us, and we analyze things together." (St. 536).

and the technique used in the laboratory "is perfectly reliable" (St. 536).

Dr. Petty acknowledged that he personally had not operated this equipment since about 1962 (St. 538), but he had received a control sample from the machine (St. 538); his assistant (Orindorff) had watched the tests while they were being run, took the information received, returned "directly" to Dr. Petty's office, and discussed it with Dr. Petty (St. 539).

Dr. Petty had some notes about this at the trial, and he used them to refresh his recollection as to the test results (St. 520). See: *Goings v. United States,* 377 F. 2d 753, at 755, hdnt. 12 (USCA-8, April 24, 1967).

Under all these circumstances, the State suggests that it was not error for the trial Court to admit the testimony of Dr. Petty.

Citing McCormick, Evidence § 15 (1955), and 3 Wigmore, Evidence § 688, (3rd ed. 1940), the United States Court of Appeals for the District of Columbia in *Jenkins v. United States,* 307 F. 2d 637, at 641 (on rehearing, in Banc, June 7, 1962) considered that

> ". . . . . the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession." (307 F 2d at 641; ftnt. omitted).

The United States Court of Appeals for the Eighth Circuit has indicated:

> ". . . . . With the increased division of labor in modern medicine, the physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought to be enough for opinion testimony in the court room."

See: *Birdsell v. United States,* 346 F. 2d 775, at 779-780 (May 17, 1965), rehearing denied (July 8, 1965), cert. denied, 382 U.S. 963, 86 S. Ct. 409, 15 L. Ed. 2d 366 (Dec. 13, 1965), rehearing denied, 383 U.S. 923, 86 S. Ct. 900, 15 L. Ed. 2d 680 (Feb. 21, 1966), rehearing denied 384 U.S. 914, 86 S. Ct. 1347, 16 L. Ed. 2d 368 (April 18, 1966).

The Washington State Supreme Court has ruled that the admission of test results is discretionary with the trial Court, so long as the records were made "in the regular course of business", even if the witness did not personally conduct the tests, because, our Court held, "such a record is presumptively reliable" when it is "made under circumstances which the Court finds rendered it trustworthy", and "there was no apparent motive to falsify." See: *State v. Rutherford,* 66 W. 2d 851, at 852-855, 405 P. 2d 719, at 720-722 (Sep. 16, 1965), rehearing denied (Nov. 2, 1965), appeal dismissed and cert. denied, *per curiam,* 384 U.S. 267, 86 S. Ct. 1477, 16 L. Ed. 2d 525 (May 23, 1966).

For other decisions upholding the admissibility of records, in the face of a challenge of the Sixth Amendment, see: *United States v. Kelly,* 349 F. 2d 720, at 770-771 (USCA-2, July 29, 1965, opinion by Senior Circuit Judge Medina, with Moore, C.J. and the now Mr. Justice Marshall), cert. denied, 384 U.S. 947, 86 S. Ct. 1467, 16 L. Ed. 2d 544 (May 16, 1966; Mr. Justice Douglas voted to grant the Petition); *McDaniel v. United States,* 343 F. 2d 785, at 789 (USCA-5 Apr. 7, 1965), rehearing denied (May 11, 1965), cert. denied 382 U.S. 826, 86 S. Ct. 59, 15 L. Ed. 2d 71 (Oct. 11, 1965).

It should also be noted that Petitioner could have, himself, obtained the compulsory attendance of the chemist (Orindorff) upon whose absence this point is predicated. See: Washington State Constitution, Art. I, Sec. 22 (amendment 10), reproduced in Appendix B; RCW 10.55, Witnesses Outside the State (Uniform Act), reproduced in Appendix C; 9 U.L.A. p. 86, and 1966 Cumulative Annual Pocket Part, p. 49, indicating that that witness's State (Maryland) had adopted the Uniform Act, (since 1955). See also: IV Martindale-Hubbell (Law Digests), 1967 ed. p. 3724 (p. 3682 in 1966 ed. when case at Bar was at trial). See also: *Annotation,* 44 A.L.R. 732.

Dr. Petty's testimony began on Friday, Jan. 28, 1966 (St. 494; 513 L), and was concluded on Monday, Jan. 31, 1966 (St. 660); he returned and testified again on Saturday, Feb. 5, 1966 (St. 1079; 1115) and concluded on that same day (St. 1140), the day the case went to the Jury. There is nothing in the record, however, indicating any attempt by Petitioner to use the compulsory-attendance-of-witnesses provisions of our State Constitution and the Statute, RCW 10.55, as to Orindorff during any of this period.

ARGUMENT AS TO ISSUE III

Petitioner is suggesting (Petition p. 3, 12, 16-17) that his rights under Amendments Six and Fourteen to the Constitution of the United States were violated because he was denied his right to know what he was charged with, with sufficient notice, and with sufficient time, to prepare his defense, because the trial Court

allowed the prosecution to amend the Information.

There is no merit to this suggestion.

Petitioner, as a defendant in a case charging him with an attempt to murder his wife by poison, misapprehends his rights as to the contents of the Information.

This honorable Court has long recognized that the Information need *not* allege the *mode* of the administration of the poison. See: *Westmoreland v. United States,* 155 U.S. 545, at 549, 15 S.C. 243, 39 L. Ed. 255, at 256 (Jan. 7, 1895, unanimous), ruling:

> "The indictment need not specify in detail the mode in which the poison affected the body, or the particular organ upon which its operation was had."

In that case this honorable Court also indicated that

> "At common law, though it was necessary to allege the kind of poison administered, nevertheless proof of the use of a different kind of poison was regarded as an immaterial variance." (155 U.S. at 549).

Simile: *Carter v. State,* 2 Ind. 617, at 618 (Sup. Ct., May Term 1851, *per curiam*). Both cases are noted in 2 *Warren on Homicide,* § 175, pp. 63-65 (Buffalo, N.Y., 1938).

Apart from this, however, the Information (Tr. 1) was *not* amended. The Information charged that Petitioner "did administer to or cause to be taken by" his wife a "poison or other destructive or noxious thing." On the trial Court's Order for Answers to Petitioner's Interrogatories, the State said the poison

was administered by injection "in the general area of the buttocks" (Tr. 7).

Petitioner, *during trial,* volunteered that he had injected a substance into his wife's hip (St. 826); and, further, that he had handled a bottle connected to her arm (St. 828). The State learned, *during trial,* that the bottle, while connected to the wife-victim's arm, had been contaminated by an injection of poison (St. 698-699). That bottle, and testimony about its contents, were offered and received into evidence (St. 697, 720-722, 699, 827-827). No objections were made, on the ground of variance between pleading and proof, at the time of its offer, or concerning Instructions referring to it.

The Superior Court Rule (promulgated by the Supreme Court of this State) Rule 101.04W, subd. 2, now Cr. R. 101.04 subd. b (Appendix D), permits amendment of an Information during trial, or considers an Information amended to conform to the proof admitted without objection. The trial Court here ruled that no formal amendment to the Information would be required (St. 1155, 1156-1157).

In this whole context, petitioner was not misled, nor disadvantaged, and, if he had been, he could have, and should have, applied to the trial Court for "such order as will secure to the defendant full opportunity to defend" (Rule 101.04W, subd. 2; Appendix D). Accord, the recent *Annotations,* 17 ALR 3rd 1181; and 17 ALR 3rd 1295.

ARGUMENT AS TO ISSUE IV

Petitioner has suggested (Petition, p. 3, 12, 17-18) that there was extensive pre-trial publicity as to this case; that his jurors had to pass through a hostile mob each day in the Courthouse hallways; that the press had allocated to it a specific group of seats — that all these matters violated his rights to a fair trial under the Fourteenth Amendment to the Constitution of the United States. The facts, whether in, or out of, the record, simply do not support these assertions.

The State would only suggest that both the public and the press have an interest in a trial; that the presence of, or availability, of the public and the press at a trial is to some considerable degree a measure of protection to a defendant; that that was the thinking of the framers of our Constitution in requiring that all criminal trials be open to the public and to the press; that both public and the press have a "standing invitation" under our Constitution to be present at a criminal case; that *only* when a Petitioner can demonstrate that public or press conduct in, around, or out of, the Courtroom, has a possible effect on juror, witness, or Court objectivity, can Petitioner fairly question the conditions surrounding his trial; that Petitioner cannot assert prejudice merely because the verdict of the jury matched his fears rather than his hopes.

There was here *no* interference by public or press, in, or out, of the Courtroom. See: *Standards Relating to Fair Trial and Free Press,* A.B.A. Project, Tentative Draft (Dec. 1966).

The public and press interest here was proper—and it simply cannot be equated with any of the circumstances in any of the following cases: *Rideau v. Louisiana,* 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (June 3, 1963); *Annotation,* 10 L. Ed. 2d 1243-1306; *Billie Sol Estes v. Texas,* 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (June 7, 1965), rehearing denied, 382 U.S. 875, 86 S. Ct. 18, 15 L. Ed. 2d 118 (Oct. 11, 1965); *Sheppard v. Maxwell,* 231 F. Supp. 37-72 (Chief Judge Weinman, USDC-ED Ohio, July 15, 1964), affirmed, 384 U.S. 333, 86 S. Ct. 601, 16 L. Ed. 2d 600 (June 6, 1966); and *Jack Rubenstein alias Jack Ruby v. State of Texas,* .... Tex. Crim. ...., 407 S.W. 2d 793, at 795, 795-803 (Ct. of Crim. App., Oct. 5, 1966), rehearing denied (Nov. 16, 1966).

ARGUMENT AS TO ISSUE V

Petitioner has suggested (Petition, p. 4, 12, 18-19) that he was denied his right to a fair trial under the Fifth, Sixth, Ninth, and Fourteenth Amendments to the Constitution of the United States, because his patient-mistress, testifying against him, testified that there were no criminal (check) charges pending in *another* County against her while she was testifying against him (St. 197, 195), and that the then Prosecuting Attorney of *our* County had so assured the trial Court (St. 191, 192, 193; Supp. St. 71) when, in fact, there were such charges pending, although apparently unknown either to that witness or to the then Prosecuting Attorney of *our* County.

Petitioner's counsel, with candor, in the trial Court, said:

". . . . . I know [the then Prosecuting Attorney] and I do not think that he ordinarily or in any circumstances would have acted this way. (Supp. St. 73-74)."

The facts as to the questioned relationship between Petitioner and the witness-mistress were testified to fully by her (St. 172-178-197); she was carefully cross-examined (St. 184-196); Petitioner, from the counsel table, denounced the witness as "committing perjury" (St. 179), and, from the witness stand himself, under oath, denied that the relationship was anything other than doctor and patient (St. 832-835; 837-839); but finally, when pressed and shown Exhibits 49, 50, 51, 52, which he had asked her to destroy (St. 840-845), he admitted, in open court, to his own counsel, that he did "have an affair" and "have relations" with her (St. 899).

Other Courts have apparently recognized that tangible objects produced by the paramour-witness against a defendant-doctor can help corroborate the essence of testimony unfavorable to the doctor, and going to the issue of motive. See, e.g., *State v. Sheppard,* 128 N.E. 2d 471, at 493-494, 498 (Ct. of App., Ohio, July 13, 1955), affirmed 165 Ohio St. 293, 135 N.E. 2d 340 (Sup. Ct., May 31, 1956), cert. denied, 352 U.S. 910, 77 S. Ct. 118, 1 L. Ed. 2d 119 (Nov. 13, 1956), rehearing denied, 352 U.S. 955, 72 S. Ct. 323, 1 L. Ed. 2d 245 (Dec. 17, 1956) where the gift was a watch.

Whatever her other problems, unknown, or known, to her, her credibility was insured by her possession of the damning Exhibits 49, 50, 51, 52. No constitu-

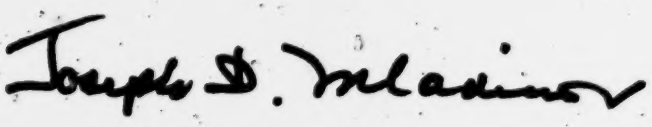
tional attack can be launched from this factual springboard. Cf. *Napue v. Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (June 15, 1959); *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (May 13, 1963); *Giles v. Maryland,* 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (Feb. 20, 1967); *People v. Nash,* 36 Ill. 2d 275, 222 N.E. 2d 473, at 477-478 (Sup. Ct., Dec. 1, 1966), rehearing denied (Jan. 17, 1967), cert. denied, ... U.S. ...., 88 S. Ct. 222, 19 L. Ed. 2d 223 (Oct. 16, 1967), with a dissent by Mr. Justice Fortas, with whom The Chief Justice and Mr. Justice Douglas join, at 19 L. Ed. 2d 681.

While we may be on the threshold of the formulation of a rule as to the duty of the prosecution to provide the defendant with any material bearing on the credibility of important witnesses, consideration of such a rule will have to wait for a factual setting in which it is applicable. This is not the case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari in this matter should be denied.

Respectfully submitted,



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Date: March 25, 1968.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 38826

En Banc

Filed July 18, 1967

(Reported in 71 Wn. Dec. 2d 609)

THE STATE OF WASHINGTON,
Respondent,
v.
ROBERT E. BOEHME,
Appellant.

Defendant, Robert E. Boehme, a medical doctor, was charged, tried before a jury, and convicted of the crime of assault in the first degree. He appeals. We affirm the conviction.

The offense involved arose out of a purported attempt on the part of defendant to poison his wife, Mary Boehme. The circumstances giving rise to the charge, as revealed by the evidence, lend themselves to the following summary.

At about 9:30 p.m., on June 29, 1965, defendant, Mrs. Boehme, and two other members of the family went to the family boathouse to work on their boat. During the course of the evening, and while defendant and Mrs. Boehme were working at the bow of the boat, a board or heavy plank fell and struck Mrs. Boehme about the head. She was stunned or briefly rendered unconscious and fell to the floor. Upon regaining her senses, she complained of pain, and defendant administered to her by injecting a substance into her hip. Defendant then, with the aid of two members of the family, carried Mrs. Boehme to the family automobile and transported her to a local hospital, the Harrison Memorial Hospital in Bremerton, Washington, and summoned Dr. Benjamin T. Strehlow, a general practitioner, who had treated her

previously. After arrival at the hospital, and before Dr. Strehlow appeared, defendant removed Mrs. Boehme's contact lenses from her eyes. Defendant testified that during this procedure he inadvertently and unintentionally utilized a type of eye drops (isopto atropine) which would cause the pupils of her eyes to dilate.

When Dr. Strehlow reached the hospital he was informed by defendant that Mrs. Boehme had suffered a severe blow on the head, although the only surface manifestation thereof was a slight abrasion in the area of the neck. The doctor was not advised of any medication Mrs. Boehme might have taken during the day, nor of the earlier injection, and of the application of any eye drops. His examination of Mrs. Boehme revealed that the pupils of her eyes were widely dilated and that she was drifting in and out of a coma. The doctor thereupon ordered skull X rays and performed a spinal tap. The X rays were negative as to bone damage; however, the spinal tap indicated a bloody discoloration of and pressure on the spinal fluid. Dr. Strehlow then concluded that Mrs. Boehme was in urgent need of the services of a neurologist and with defendant's participation arrangements were made to transport her by ambulance to St. Joseph's Hospital in Tacoma, for the attention of Dr. Stanley Durkin, a neurologist and neurosurgeon.

The ambulance with Mrs. Boehme, the driver, one attendant, and the defendant reached St. Joseph's Hospital at about 1:30 a.m., June 30, 1965. The ambulance was met by Dr. Durkin. The defendant delivered samples of the spinal fluid removed by Dr. Strehlow and informed Dr. Durkin that Mrs. Boehme had been struck on the head. Again, the defendant neglected or forgot to advise the doctor of any earlier medications. Finding no superficial evidence of a blow to the head, except the neck contusion, Dr. Durkin ordered immediate skull X rays. Again the X rays were essentially negative as to skull damage; however, the doctor's physical examination, conducted while Mrs. Boehme was on the X ray table, revealed that she was

then in a deep semicomatose condition, that the pupils of both eyes were widely dilated and fixed, that her abdomen was hard and rigid, that her body muscles were spontaneously twitching and jumping, that deep tendon reflexes were absent, and that respiration was irregular. Proceeding upon a working diagnosis of brain injury, Dr. Durkin placed her in a hospital room under constant observation. Shortly after Mrs. Boehme arrived at her hospital room, and between 2:30 a.m. and 3:15 a.m., extreme respiratory difficulty developed. Artificial respiration, oxygen, and a Byrd respirator, an automatic breathing machine, were applied, the latter by the use of a face mask. Although these steps alleviated the immediate respiratory failure, her condition despite intermediate adjustments of the respirator did not measurably improve and by 8 a.m. her condition was diagnosed as terminal. At this point the Byrd respirator was turned on the fully controlled breathing cycle and connected to a tracheal tube leading directly into her windpipe. A second spinal tap was also made and again revealed discoloration of and pressure on the spinal fluid. The defendant was advised that her condition was very critical. Having patients of his own to care for, the defendant returned to his office.

During the course of the day, Mrs. Boehme rallied. Various of her symptoms diminished and her respiration improved to the point where she could breathe without the aid of the automatic respirator. She was placed upon an intravenous solution of glucose and water and, by early evening, her vital signs were such as to permit removal of the tracheal tube and coherent conversation. Dr. Durkin advised defendant he felt she was on the road to recovery.

At about 9 p.m., after Dr. Durkin had visited Mrs. Boehme and found her condition continuing to improve, the special nurse left her in the temporary charge of a student nurse. Shortly thereafter, defendant visited his wife and asked the attending nurse to leave the room. The student nurse complied, but returned to the room in a few minutes at which time

she observed defendant move his hand from the area of Mrs. Boehme's hip to his pocket. Again the defendant requested the nurse leave him alone with his wife, and again the nurse complied. On this occasion, however, the nurse reported the circumstances of her absence to the floor nurse who immediately entered Mrs. Bohme's room. At about this time, the defendant departed. The floor nurse, in company with the student nurse and the special nurse, then observed a fresh hypodermic injection site on Mrs. Boehme's hip. The nurses also noted that Mrs. Boehme was having difficulty in breathing. Dr. Howard Pratt, the anesthesiologist, who had previously removed the tracheal tube for the Byrd respirator, and an intern, a Dr. Kazi, were summoned and upon arrival found Mrs. Boehme in extreme straits. Her earlier symptoms had returned, her respiration was of the terminal type, and the doctors conceived that she was dying. Emergency measures were initiated, the trachea tube was reinstalled and the Byrd respirator reactivated. Dr. Durkin arrived and after consultation with Dr. Pratt and other doctors on the scene it was concluded that her condition was induced or caused by poisoning through the medium of some rare drug. This conclusion was reached upon the basis of the hypodermic injection sites on her hip and because some of her symptoms could not be reconciled with any but the gravest of brain injuries. Blood and urine samples were then taken, the intravenous bottle was detached, and all were sealed, marked for identification, and placed under refrigeration for subsequent analysis.

During the early morning hours of July 1, 1965, Mrs. Boehme again rallied dramatically. From that time forward she improved steadily and was ready for release from the hospital on July 15, 1965.

During the interval between July 1 and July 15, 1965, additional blood samples were taken, marked for identification, and refrigerated. These samples, together with the earlier blood samples were sequen-

tially prepared for analysis [1] and, with a similarly prepared sample of normal blood and the urine specimens, were forwarded to the office of the chief medical examiner of the state of Maryland for the attention of and analysis by Dr. Charles S. Petty, a pathologist and assistant medical examiner, and Dr. Henry C. Freimuth, a toxicologist in the chief medical examiner's office.

The intravenous (I.V.) bottle, detached and removed on the night of June 30, 1965, sealed with distinctively marked tape, remained in the refrigerator of the hospital medicine room until July 20, 1965. At that time it was removed by a nurse, who testified as to its markings and seal, and delivered to a police officer. The police officer in turn delivered it to Dr. Charles P. Larson, a Tacoma pathologist, who had been called to St. Joseph's Hospital for consultation on the night of June 30, 1965. Dr. Larson examined the markings and seal, locked the bottle in his evidence locker, and on January 19, 1966, delivered it for analysis to Dr. David A. Eagleson, a toxicologist and analytical chemist at the Tacoma General Hospital, who had also been present at the events occurring during the late night and early morning of June 30 and July 1, 1965, respectively, at St. Joseph's Hospital.

Dr. Eagleson testified that his analysis of the fluid in the intravenous bottle, a unit normally sealed with its contents by the manufacturer, although otherwise designed to receive injections of substances supplementary to its original contents, revealed approximately 1.39 milligrams of promazine per 50 cc's of fluid in the bottle. Promazine, otherwise known as sparine, was identified during the trial as a potent tranquilizing drug. Dr. Eagleson testified such a drug was not produced by the manufacturer of the intravenous bottle and its contents.

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1. The preparation referred to was accomplished by separating through a centrifuging process, the respective blood samples into plasma and red blood cell components. The samples of the respective components were in turn marked for identification as units of the original samples.

Dr. Friemuth, the Maryland toxicologist, testified his analysis of the first urine specimen, covering the period from 9:45 p.m., June 30, 1965, to 2 a.m., July 1, 1965, revealed a concentration of free promazine in the quantity of 1 milligram per 100 cc's of fluid, in addition to breakdown products of promazine. He stated that his analysis of the second urine sample, covering the period from 12 o'clock noon to 2:30 p.m., July 2, 1965, indicated no free promazine, but did reveal breakdown products of the drug. He detected no other pertinent toxic substances in the urine samples.

Dr. Petty, the assistant medical examiner of Maryland, testified that comparison tests of the various blood samples were conducted under his supervision and control. He stated that such tests revealed the presence of an anti-cholinesterase agent in Mrs. Boehme's system on the night of June 30, 1965. This agent, he opined, was a drug of the carbamate class. Cholinesterase was described by the evidence as an enzyme, present throughout body tissues, which performs the function of transmitting brain impulses from the nerve circuits to the muscles. The introduction into the body of an anti-cholinesterase agent, under the evidence, thus would have the effect of impeding or arresting the conduction of vital and essential impulses from the brain to the muscular system. Dr. Petty further testified that the tests indicated a significant reduction in Mrs. Boehme's cholinesterase level on the night of June 30th, that brain injury would not cause such a diminishment and that the introduction of promazine into the system would accelerate the effects of any anti-cholinesterase agent then present in Mrs. Boehme's body.

The evidence introduced in support of a motive for the offense charged to the defendant, indicated that Mrs. Boehme was heavily insured and that the defendant was involved in an extramarital affair.

In response to the evidence adduced by the state, the defendant denied any action, effort or wish on his part to poison his wife. He presented testimony to the effect that Mrs. Boehme was emotionally unsettled;

that the tranquilizing drug promazine (sparine) had been prescribed to alleviate her condition; that events occurring during the day of June 29, 1965, unduly disturbed her; that she took an unusually heavy dosage of her tranquilizing drug on June 29th (upwards of 1500 milligrams), a fact which defendant did not discover until the late afternoon of June 30th; that such an overdose would account for the free promazine and the by-products thereof in the urine samples; that immediately following the blow to Mrs. Boehme's head in the boathouse on June 29th, defendant administered a hip injection of 1/6th of a grain of morphine to relieve her pain; that the introduction of eye drops with dilating propensities at the hospital in Bremerton was inadvertent and not immediately known to defendant; that when defendant visited his wife in the hospital on the evening of June 30th he asked to be alone with her so that they could pray together; that while alone with her defendant administered a hip injection of 20 milligrams of the drug ritalin, a mild stimulant, to offset the effects of her overdosage of promazine; that although defendant then examined the intravenous bottle he did not put anything into it; that any evidence of promazine in the fluid in the intravenous bottle was explicable only on the basis that it was not adequately guarded between the time of its removal on June 30, 1965, and analysis in January, 1966; that defendant visited his wife around 7 a.m., July 1, 1965, and found her well on the road to recovery, which confirmed his belief that the ritalin he had administered the night before had neutralized the overdose of promazine; that defendant's failure to fully advise the attending physician of the overdose of promazine, the morphine injection, the eye drops, and the ritalin injection was due to oversight, inability to communicate with the doctor, or the unwise choice of alternatives rather than a deliberate act; that Mrs. Boehme's symptoms and the course of her recovery were consistent with and due to a head injury and the other factors involved rather than the result of any type of poisoning by defendant; that defendant was not in need of

money and, although he initially denied and then admitted an affair, the extramarital relationship with another woman was misguided and of no significance; and that defendant and Mrs. Boehme mutually loved, trusted, and respected one another at all times concerned.

In contradiction to the testimony relating to the presence of an anti-cholinesterase agent in any of the blood samples, the defendant presented the testimony of Dr. Charles H. Hine, a physician, toxicologist, and professor of toxicology employed by the University of California and associated with the San Francisco city and county coronor's department. Dr. Hine, in essence, questioned the sufficiency, accuracy, reliability, significance, and credibility of the conclusions drawn and presented by Dr. Petty in relation to the blood tests conducted under Dr. Petty's supervision. Dr. Hine's primary predicates in this respect were the length of time elapsing between the drawing of the blood and its processing, the limited number of samples tested, the differences between cholinesterase enzymes found in plasma and red blood cells, the lability of carbamate drugs in relation to cholinesterase enzymes, the variations in cholinesterase levels between individuals, as affected by different causes, the exactness required in testing, and the susceptibility of laboratory testing techniques to error. In short, Dr. Hine indicated that Dr. Petty's tests and conclusions were not worthy of any significant weight. He did not, however, directly attack the method or manner of testing employed by Dr. Petty.

Dr. Hine also assailed the significance of Dr. Friemuth's findings of promazine and the by-products thereof in the urine samples. This he did upon the basis that the quantities of promazine reportedly found in the urine samples betokened, at best, only a nonpoisonous and otherwise harmless intake of the drug. Dr. Hine further testified that in his opinion Mrs. Boehme's symptoms and course of recovery indicated a head injury rather than any bizarre type of poisoning.

Finally, Mrs. Boehme testified to the effect that she did not believe the defendant attempted to poison or harm her in any way and that she loved and trusted him and expected to continue to live with him as his wife.

Confronted with the foregoing circumstances and testimony, the jury found defendant guilty as charged.

On appeal, defendant makes 26 assignments of error. By way of argument in support of his assignments, defendant groups them into 8 categories. For convenience of discussion, we reduce the categories to 5. Our consideration will therefore revolve about claims of error directed to rulings of the trial court relative to (1) pretrial discovery; (2) physician-patient privilege; (3) admission of certain exhibits; (4) admission of certain medical testimony; and (5) procedural matters.

PRETRIAL DISCOVERY

In this category defendant directs his attention to the trial court's order denying his motion to require the state to furnish him copies of medical reports and the results of blood and urine tests.

The following resume is the pleading background to the pertinent order of the trial court. The information charging defendant with the offense involved was filed September 20, 1965. Arraignment followed on September 21, at which time defendant interposed a motion to make the information more definite and certain or, in the alternative, to require the state to answer specified interrogatories bearing upon the nature of the poison allegedly used and the manner and nature of its administration. The state was directed to answer the interrogatories in basic part, which it did by stating that the poison involved was an anticholinesterase agent and/or promazine administered in the hip of Mrs. Boehme at St. Joseph's Hospital. The defendant then pleaded not guilty and bail was fixed and posted. On or about October 1, 1965, the state served defendant with its list of witnesses, and, on October 11, 1965, defendant filed and served his

motion for production of reports and statements. The motion was couched in all inclusive terms requesting copies of "all written reports received from any doctor, professional, or expert person . . . including reports and discussions of tests performed upon the blood, tissues, parts, fluids, or products of the body of said Mary Boehme." Furthermore, the motion sought divulgance of any oral reports, as well as all laboratory reports regarding pertinent blood, fluid, or tissue tests. The motion came on for hearing and on October 21, 1965, the trial court entered its order providing as follows:

> IT IS HEREBY ORDERED that the plaintiff State of Washington shall state with particularity the disposition of any blood samples, tissues, parts, fluids or products of the body of Mary Boehme drawn or taken from her on or after the 29th day of June, 1965.
>
> IT IS FURTHER ORDERED that it appearing that the defendant has not made a sufficient showing *at this time* that the other material sought by the motion is not available to him by other means, that all of the rest of the defendant's motion is denied. (Italics ours.)

At or about this time Mrs. Boehme, acting through defendant's counsel, in separate civil proceedings, sought and obtained orders from another department of the Superior Court for Pierce County restraining Dr. Durkin and the custodian of the records of St. Joseph's Hospital from divulging or releasing pertinent medical information and documents, and the prosecuting attorney from conferring with certain other medical witnesses. These orders were predicated upon the ground of a claim of the physician-patient privilege by Mrs. Boehme. Following these orders, it appears that various of the medical witnesses listed or expected to be called as witnesses by the state were advised by letter from counsel that Mrs. Boheme intended to claim the full benefit of her privilege as to any confidential information they might possess or divulge. From and after the trial court's order of

October, 21, and the civil proceedings, it does not appear from the record that defendant renewed his motion for the production of any documents, reports or laboratory tests in the possession of the prosecution before the trial commenced on January 24, 1966.

At this point, we momentarily pause to observe that the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a two-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage. *State v. Robinson,* 61 Wn. 2d 107, 377 P.2d 248 (1962); *State v. Gilman,* 63 Wn. 2d 7, 385 P.2d 369 (1963); *State v. Peele,* 67 Wn.2d 893, 410 P.2d 599 (1966).

In view of all of the circumstances appearing, including the fact that the trial court's order contained an inherent invitation to defendant to renew his motion and present a more adequate showing of necessity, we are convinced this claim of error falls squarely within the ambit of our holding in *State v. Mesaros,* 62 Wn.2d 579, 384 P.2d 372 (1963), wherein we said at 587:

> There appears to be a growing tendency, not only in this state, but in other jurisdictions as well, to liberalize the right of a defendant to discovery in criminal cases. See *Powell v. Superior Court,* 48 Cal. (2d) 704, 312 P. (2d) 698 (1957), and *Walker v. Superior Court,* 155 Cal. App. (2d) 134, 317 P. (2d) 130 (1957). The *Thompson* case would appear to follow the same philosophy and reasoning, but it must be remembered that all of these cases are based upon the same fundamental rule that the granting or denial of a defendant's motion for discovery rests within the discretion of the trial court and will not be dis-

turbed in the absence of a manifest abuse of discretion.

> In the instant case, the court granted a portion of appellant's motion for inspection and reserved the right to him to renew this motion on a further showing of necessity. Although he prepared an additional motion, he failed to present it to the court. In other words, the court opened the door to him but he failed to enter. There is no way that this court or anyone else can now discover what the court's ruling might have been, had this motion been further urged and proper showing made in support of it. The court was not given an opportunity to exercise its discretion, although the record indicates a liberal and fair attitude. Under the circumstances of this case, we find no error in the court's failure to grant further discovery.

We so hold in this case.

PHYSICIAN-PATIENT PRIVILEGE

As indicated in our discussion under the preceding category, it became apparent early in the course of this case that Mrs. Boehme intended to claim the physician-patient privilege as to information gained by the physicians and hospital personnel who attended her between June 29 and July 16, 1965. This she did through defendant's counsel acting on her behalf, both by way of civil actions seeking to restrain their testimony as well as asserting the privilege at defendant's trial.

The trial court denied Mrs. Boehme's claim of privilege and overruled defendant's objections to the pertinent testimony. Defendant assigns error, contending that the trial court's action abrogates the privilege and/or constitutes an invasion of Mrs. Boehme's constitutional right of privacy.

We cannot agree with defendant.

At common law, no testimonial privilege existed between patient and physician as to communications or

information passing between them. The privilege, as we accept it today is the creature of statute, and as such is a procedural safeguard rather than a rule of substantive or constitutional law. The applicability, therefore, of the privilege in a given situation turns upon the language and interpretation of the pertinent statutory provisions.

In this state, the significant statutory provisions are RCW 5.60.060(4), 10.58.010, and 10.52.020, which respectively provide:

> A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient, but this exception shall not apply in any judicial proceeding regarding a child's injuries, neglect or sexual abuse, or the cause thereof. RCW 5.60.060(4).
>
> The rules of evidence in civil actions, *so far as practicable,* shall be applied to criminal prosecutions. RCW 10.58.010. (Italics ours.)
>
> Witnesses competent to testify in civil cases shall be competent in criminal prosecutions, but regular physicians or surgeons, clergymen or priests, shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character; . . . RCW 10.52.020.

The judicially proclaimed purpose of statutes such as ours, establishing the privilege, is to surround communications between patient and physician with the cloak of confidence, and thus allow complete freedom in the exchange of information between them to the end that the patient's ailments may be properly treated. *State v. Miller,* 105 Wash. 475, 178 Pac. 459 (1919).

In the last cited case (*State v. Miller, supra*), we construed the foregoing statutes to mean that the

privilege provided by RCW 5.60.060(4) was, by virtue of RCW 10.58.010, extended to criminal prosecutions, in the sense that a defendant, standing charged with a crime, could claim and assert the privilege as to the testimonial knowledge of a physician acquired in the course of professionally treating such defendant. Despite the fact that our sister states of California,[2] Oregon,[3] Idaho,[4] Montana,[5] and Utah[6] have otherwise applied analogous statutory provisions, we have steadfastly adhered to our ruling in the *Miller* case. *State v. Sullivan,* 60 Wn.2d 214, 373 P.2d 474 (1961); *State v. McCoy,* 70 W.D.2d 935, 425 P.2d 874 (1967).

We have, however, refused to permit an accused person to claim the privilege arising between an *examining* physician and the victim of the accused person's crime. *State v. Winnett,* 48 Wash. 93, 92 Pac. 904 (1907); *State v. Thomas,* 1 Wn.2d 298, 95 P.2d 1036 (1939); *State v. Fackrell,* 44 Wn.2d 874, 271 P. 2d 679 (1954). Although none of these cases dealt directly with the right of an accused to claim the privilege arising between the victim and his or her *treating* physician, we did note in the *Fackrell* case, at 878, that

> The former decisions of this court fit into the rationale of the majority rule set forth by R. P. Davis in an annotation entitled "Right of one against whom testimony is offered to invoke privilege of communication between others," appearing in 2 A.L.R. (2d) at 647, wherein it is said:
>
> "The weight of authority supports the view that the doctrine of privileged communications as between physician and patient, usually incorporated in statutory enactments, is intended for the

2. *People v. Gonzales,* 182 Cal. App. 2d 276, 5 Cal. Rptr. 920 (1960).

3. *State v. Betts,* 235 Ore. 127, 384 P. 2d 198 (1963).

4. *State v. Bounds,* 74 Idaho, 136, 258 P. 2d 751 (1953); *State v. Coburn,* 82 Idaho 437, 354 P. 2d 751 (1960).

5. *State v. Campbell,* 146 Mont. 251, 405 P. 2d. 978 (1965).

6. *State v. Dean,* 69 Utah, 268, 254 Pac. 142 (1927).

> benefit of the patient, and that the defendant in a criminal prosecution has no right to object to the testimony of a physician concerning communications made by the victim of the crime to such physician, or information gained from the victim by the physician, in his professional capacity."

We find no reason asserted in our cases, in our application of our statutory provisions, or in the statutory provisions themselves which would require a departure or a deviation from the majority rule recognized and cited in the *Fackrell* case.

Accordingly, we hold that the defendant could not assert the doctor-patient privilege flowing to Mrs. Boehme as the patient and asserted victim of the alleged crime.

This, then, leaves the question of the efficacy of Mrs. Boehme's claim, as patient-victim, of the privilege.

In this respect, it is generally recognized and accepted that the privilege is essentially one intended for the benefit of the patient, and is one personal to the patient. *State v. McCoy, supra.* This approach is in keeping with the underlying purpose of the privilege, that is, to facilitate and safeguard a free exchange of information in the course of treatment. A further purpose has also been occasionally noted — that of protecting the patient from embarrassment, scandal, or incrimination which might flow from the revelation of intimate details connected with the medical treatment of physical ills. These purposes are benevolent and wholesome. They fully warrant and justify the privilege in appropriate cases.

The privilege, however, should be fairly limited to its purposes. Absent the most cogent of reasons, it should not, by unrealistic or impractical application, become a means whereby criminal activities of third persons may be shielded from detection, prosecution, and punishment, however magnanimous, compassionate or conciliatory the victim might otherwise wish to be. To allow the privilege to thus become a device

by which the victim of an attempted crime could, without a civically paramount reason, thwart the course of a criminal proceeding against the perpetrator might well promote greater evils than the privilege was designed to avoid. The maintenance of an orderly society, and the circumvention of criminal activities, are functions of government which should not be subject to casual suppression by the operation of a procedural rule primarily designed for the purpose of aiding in the healing of physical ailments. *Cf. People v. Lay,* 254 App. Div. 372, 5 N.Y.S. 2d 325 (1938), *aff'd* 279 N.Y. 737, 18 N.E.2d 686 (1939); *Wimberly v State,* 217 Ark. 130, 228 S.W.2d 991 (1950); *State v. Antill,* 176 Ohio St. 61, 197 N.E.2d 348 (1964).

In the instant case, we can conceive of little additional embarrassment or humiliation visited upon Mrs. Boehme by virtue of admission of the challenged evidence than that occasioned by the bringing of the charges in the first instance. Likewise, the testimony of the treating physicians and/or hospital personnel by no manner of means subjected her to any form of criminal liability. Moreover, we cannot visualize any significant public interest which would be served by foreclosing a full judicial investigation of the charges here preferred.

Bearing in mind that the legislature, by RCW 10.58.010, in effect, attached a condition of practicality to the application of the physician-patient privilege in criminal prosecutions, we conclude that the trial court did not err in overruling Mrs. Boehme's claim of the privilege under the circumstances prevailing in the instant case.

ADMISSION OF CERTAIN EXHIBITS

By his assignments of error falling into this category, defendant challenges the admission into evidence of the blood and urine samples and the intravenous bottle with its contents. In this vein, he argues that the state failed to sufficiently establish the identity of the exhibits, the chain of custody through which they passed, and the freedom from possible contamination.

We find no reversible error within the framework of defendant's contentions.

The applicable rule, distilled from a pertinent annotation in 21 A.L.R. 2d 1216 (1952) and later cases, is succinctly summarized in 29 Am. Jur. 2d *Evidence* § 775 (1967) at 845:

> When objects, such as bullets, specimens, or parts taken from a human body, are produced in court and used there as an exhibit or made the basis for the testimony or report of an expert or officer, the identity of the object produced with the object taken from the body must be proved. Proof of this identity involves showing that the thing was taken from the particular body from which it was supposed to be taken, and that thereafter it was properly kept and, if necessary, transported and delivered to the one who produced it at the trial or the expert who analyzed or examined it.

Our review of the evidence presented satisfies us that the state fully complied with the requirements of the rule. Without detailing the testimony, it is sufficient to say that the state, through the testimony of the participating hospital, medical, and law enforcement personnel, methodically traced the identity, markings, custody, storage, preparation, and transportation of the respective samples and specimens from Mrs. Boehme's body and hospital room to the hands of the analyst. Time factors, and the potential effect thereof upon ultimate analysis, were fully explored and explained by the competing experts. And, beyond mere speculation and innuendo, there is not the least indication in the evidence that the questioned exhibits were anything other than what they were represented to be or that they were contaminated in the course of their journey to the testing laboratory.

The trial court did not err in admitting them into evidence. The weight to be accorded to the exhibits was for the jury.

ADMISSION OF CERTAIN MEDICAL TESTIMONY

Defendant, by his assignments of error in this category, focuses attention upon the results of the chemical tests performed on the blood samples, as related by Dr. Petty, the Maryland pathologist.

In this regard, the testimony essentially reveals that after the respective samples came into his possession Dr. Petty and his assistant, a graduate chemist, working together in their laboratory facility, prepared the samples for analysis by the titrimetric or titration method. Thereafter, Dr. Petty's assistant took the prepared samples to a second laboratory, which, by the terms of a contract existing over a number of years, made available an automatic titrating machine for Dr. Petty's use. At this point, Dr. Petty's assistant placed or participated in placing the samples in the machine, observed the operation of the machine, recorded the outcome, and returned with the information to Dr. Petty's laboratory. There, Dr. Petty and his assistant correlated and compared the data with data from control samples, evaluated the analysis and determined the final result of the tests. Dr. Petty testified that his assistant was subject to his direction and that the process of analysis was under his supervision and control. Although a defendant's expert, Dr. Hine, stressed the need for accuracy, he did not directly criticize the procedure or method of testing employed by Dr. Petty.

Defendant's assignments of error arise out of the fact that Dr. Petty's assistant was not called as a witness and Dr. Petty did not personally observe the operation of the automatic titration machine. The epitome of the contentions is concisely expressed in the following excerpt from defense counsel's objection to the challenged testimony during trial:

> In fairness to the witness, I believe he stated the tests were performed under his supervision, and the issue that I was making is that super-

> vision is not sufficient unless it includes observation, ...

We were confronted with a similar challenge in the case of *State v. Rutherford,* 66 Wn.2d 851, 405 P.2d 719 (1965). After analogizing the situation there presented to the Uniform Business Records Act, RCW 5.45.020, and the underlying purposes of that act, we discussed and distinguished the principal cases relied upon by defendant (*State v. Baker,* 56 Wn.2d 846, 355 P.2d 806 (1960) and *Seattle v. Bryan,* 53 Wn.2d 321, 333 P.2d 680 (1958)) and stated at 855:

> We conclude that the trial court did not abuse its discretion in permitting the witness to give the results of tests performed under his supervision and control, even though he did not personally conduct the tests or witness their performance.

Although we cannot, under the circumstances of this case, applaud or commend the state's failure to call Dr. Petty's assistant as a witness, we are not persuaded that the trial court committed reversible error in admitting Dr. Petty's testimony.

PROCEDURAL MATTERS

The errors assigned by defendant in this category are directed to (a) a trial amendment of the information, (b) the giving of instructions embracing the matter contained in the trial amendment, (c) defendant's challenge to the sufficiency of the evidence, (d) newly discovered evidence bearing upon the credibility of a witness, (e) evidence suggesting prejudice on the part of a juror, and (f) the publicity attendant upon the charges and the trial. Defendant contends the claimed errors individually and/or cumulatively deprived him of due process of law and a fair trial.

It would unduly prolong this opinion to discuss each claim of error in detail. Suffice it to say we have carefully reviewed and evaluated the various assignments standing alone and in the aggregate and are not persuaded that any reversible error flows therefrom. Defendant was competently, intelligently and

energetically represented at all stages of the proceeding. The character, nature, and extent of the evidence presented in his defense reflects ample prtrial information and preparation. All significant procedural and technical issues presented were countered. The publicity attendant upon the case cannot be equated with that found in *Sheppard v. Maxwell,* 384 U.S. 333, 16 L.Ed. 2d 600, 86 Sup. Ct. 1507 (1966). Post trial matters were carefully considered and weighed by the trial court and we find no basis warranting the substitution of our judgment in these matters for that of the trial court. The evidence presented by the state, if believed by the jury, was ample to sustain the verdict.

We conclude that defendant received a fair trial and was accorded due process of law.

The judgment is affirmed.

HAMILTON, *J.*

We Concur:
FINLEY, *C.J.*
HILL, *J.*
DONWORTH, *J.*
WEAVER, *J.*
ROSELLINI, *J.*
HUNTER, *J.*
BARNETT, *J. Pro Tem.*

APPENDIX B

CONSTITUTIONAL PROVISIONS

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . . "

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . "

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense."

Ninth Amendment

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PROVISIONS OF THE CONSTITUTION OF THE STATE OF WASHINGTON

Amendment 10

Art. 1 § 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [1921 p 79 § 1. Approved November, 1922.]

APPENDIX C

STATUTORY PROVISIONS

REVISED CODE OF WASHINGTON (RCW)

Chapter 5.45: Uniform Business Records as Evidence Act.

5.45.010 "Business" defined. The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

5.45.020 Business records as evidence. A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

5.60.060 Who are disqualified—Privileged communications. The following persons shall not be examined as witnesses:

(1) A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

* * * *

(4) A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient.

9.11.010 Assault in the First Degree Defined—How Punished. Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another. . . .

(2) Shall administer to or cause to be taken by another, poison or any other destructive or noxious thing so as to endanger the life of another person, shall be guilty of assault in the first degree and shall be punished by imprisonment in the state penitentiary for not less than five years.

10.52.020 Competency—Generally. Witnesses competent to testify in civil cases shall be competent in criminal prosecutions, but regular physicians or surgeons, clergymen or priests, shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character; * * *

Chapter 10.55: Witnesses Outside the State (Uniform Act)

* * * *

10.55.060 Witness from another state summoned to testify in this state. If any person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness either for the prosecution or for the defense, in a criminal action pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Chapter 10.58: Evidence

10.58.010 Rules—Generally. The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions.

APPENDIX D

RULE OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON

RULES OF PLEADING, PRACTICE AND PROCEDURE (RPPP)

* * * *

RULE 101.04W. CRIMINAL PROCEDURE

* * * *

(2) At any time before or during trial the court may permit the amendment of an information and permit proof to be offered in support thereof, and if the defendant shows to the satisfaction of the court that he would thereby be misled, the court shall make such order as shall secure to the defendant full opportunity to defend. An information shall be considered amended to conform to the evidence introduced without objection in support of the crime substantially charged therein, unless the defendant would thereby be prejudiced in a substantial right.

CRIMINAL RULES FOR SUPERIOR COURT (Cr R)

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RULE 101.04W. CRIMINAL PROCEDURE—MISCELLANEOUS

* * * *

(b) Amendment of Information. At any time before or during trial, the court may permit the amendment of an information and permit proof to be offered in support thereof. If the defendant shows to the satisfaction of the court that he is misled by the amendment, the court shall make such order as will secure to the defendant full opportunity to defend. An information shall be considered amended to conform to the evidence introduced without objection in support of the crime substantially charged therein, unless the defendant is prejudiced in a substantial right.